


UNIVERSITY
OF CALIFORNIA
LOS ANGELES

LAW LIBRARY

FACULTY LIBRARY





Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

New York (State) Reports. Supreme Court.

REPORTS

OF

DECISIONS IN CRIMINAL CASES

MADE *Reynolds*
AT TERM, AT CHAMBERS

AND IN THE

COURTS OF OYER AND TERMINER

OF THE

STATE OF NEW YORK.

BY AMASA J. PARKER, LL. D.

VOL. II.

ALBANY:

GOULD, BANKS & CO., 475 BROADWAY,

NEW YORK:

BANKS, GOULD & CO., 144 NASSAU-STREET.

1860.

FacLib
KEN
6100
A52P3
v.2

FL
S
MAY 76
C86 p
1958
v.2

Entered according to act of Congress, in the year one thousand eight hundred and fifty-six,
By GOULD, BANKS & CO.,
in the clerk's office of the district court of the northern district of New York.

BY AMASA J. PARKER, J.L.D.

VOL. II.

ALBANY:
GOULD, BANKS & CO., 115 BROADWAY
NEW YORK.
BANKS, GOULD & CO., 115 NASSAU STREET.
1856.

JUSTICES OF THE SUPREME COURT.

OF THE

STATE OF NEW YORK,

SINCE THE ADOPTION OF THE CONSTITUTION OF 1847.

FIRST JUDICIAL DISTRICT.

SAMUEL JONES,
ELISHA P. HURLBUT,
JOHN W. EDMONDS,
HENRY P. EDWARDS,
WILLIAM MITCHELL,
JAMES G. KING, JUN.,
JAMES J. ROOSEVELT,
ROBERT H. MORRIS,
THOMAS W. CLERKE,
EDWARD P. COWLES,
HENRY E. DAVIES,
JAMES R. WHITING.

SECOND JUDICIAL DISTRICT.

SELAH B. STRONG,
WILLIAM T. McCOUN,
NATHAN B. MORSE,
SEWARD BARCULO,
JOHN W. BROWN,
WILLIAM ROCKWELL,
GILBERT DEAN,
JAMES EMOTT.

JUSTICES OF THE SUPREME COURT.

THIRD JUDICIAL DISTRICT.

WILLIAM B. WRIGHT,
IRA HARRIS,
MALBONE WATSON,
AMASA J. PARKER,
GEORGE GOULD.

FOURTH JUDICIAL DISTRICT.

DANIEL CADY,
ALONZO C. PAIGE,
JOHN WILLARD,
AUGUSTUS C. HAND,
CORNELIUS L. ALLEN,
AMAZIAH B. JAMES,
AUGUSTUS BOCKES,
ENOCH H. ROSEKRANS.

FIFTH JUDICIAL DISTRICT.

CHARLES GRAY,
DANIEL PRATT,
PHILO GRIDLEY,
WILLIAM F. ALLEN,
FREDERICK W. HUBBARD,
WILLIAM J. BACON.

SIXTH JUDICIAL DISTRICT.

WILLIAM H. SHANKLAND,
HIRAM GRAY,
CHARLES MASON,
EBEN B. MOREHOUSE,
LEVINUS MONSON,
SCHUYLER CRIPPEN,
RANSOM BALCOM.

SEVENTH JUDICIAL DISTRICT.

THOMAS A. JOHNSON,
JOHN MAYNARD,
HENRY WELLES,
SAMUEL L. SELDEN,
HENRY W. TAYLOR,
THERON R. STRONG,
E. DARWIN SMITH.

JUSTICES OF THE SUPREME COURT.

EIGHTH JUDICIAL DISTRICT.

**JAMES G. HOYT,
JAMES MULLETT,
SETH E. SILL,
RICHARD P. MARVIN,
MOSES TAGGART,
LEVI F. BOWEN,
BENJAMIN F. GREEN.**

NOTE.—In addition to the decisions of the Justices of the Supreme Court, this volume contains decisions made by the Hon. R. H. Walworth, Circuit Judge, before the adoption of the present judiciary system, and also three cases decided recently by the Court of Appeals of this state and not before reported.

CASES

REPORTED IN THIS VOLUME.

B		J	
The People v. Bates,.....	27	The People v. Johnson,	322
The People v. Banker,	26	K	
The People v. Benjamin,	201		
The People v. Boujet,.....	11	The People v. Kennedy,.....	312
The People v. Burns,	34	The People v. Kirby,.....	28
C		L	
The People v. Caniff,.....	586	The People v. Lake,.....	215
The People v. Cavanagh,.....	650	Low v. The People,.....	37
The People v. Chadwick,.....	163	M	
The People v. Christie,.....	579		
The People v. Cook,.....	12	McCarron v. The People,.....	183
D		McGuire v. The People,.....	148
		The People v. McMahon,.....	663
Darry v. The People,.....	606	The People v. Merrill,.....	590
The People v. Derrick,.....	230	The People v. Miller,.....	197
The People v. Donnelly,.....	182	The People v. Mack,.....	673
F		The People v. Mosher,.....	195
		The People v. Muldoon,.....	13
The People v. Fisher,.....	402	O	
The People v. Fuller,.....	16		
H		Osborne v. The People,	583
		P	
The People v. Hammill,.....	223		
The People v. Hartwell,.....	32	The People v. Porter,	14
The People v. Hewett,	20	Q	
The People v. Hoag,.....	9		
The People v. Hoag,.....	36	The People v. Quant,	410
The People v. Hyler,.....	566		
The People v. Hyler,.....	570		

R

The People v. Randolph,.....	174
The People v. Randolph,.....	213
The People v. Robinson,.....	235

S

Skiff v. The People,.....	139
The People v. Snyder,.....	23
The People v. Sprague,.....	43

T

The People v. Thurston,.....	49
The People v. Toynbee,.....	329
The People v. Toynbee,.....	487

V

Van Zant v. The People,.....	163
The People v. Vinegar,.....	24

W

The People v. Willey,.....	19
The People v. Winters,.....	10
The People v. Wood,.....	22
Wynehamer v. The People,.....	377
Wynehamer v. The People,.....	421

DECISIONS
IN
CRIMINAL CASES
IN THE
STATE OF NEW YORK.

CLINTON OYER AND TERMINER, July 2, 1823. Before *Walworth*,
Circuit Judge, and the County Judges.

THE PEOPLE vs. DAVID HOAG.

In alleging the commission of perjury, the day laid in the indictment is not material, and the offence may be proved to have been committed on any other day, before or after the time laid.

This was an indictment for perjury on an arbitration, on a written submission to arbitrators. The indictment alleged the perjury to have been committed on a particular day in October, 1819, under a *videlicet*. The written submission, when produced, was dated subsequently to the time when the perjury was, by the indictment, charged to have been committed.

J. Lynde and *A. J. Sperry*, for the prisoner, insisted that the day was material, and that the perjury being laid to have been committed on a day previous to that on which, by the evidence, it appeared the submission was made, the variance was fatal.

J. Palmer, (District Att'y,) and *W. Swetland*, for the people.
VOL. II. 2

The People v. Hoag.

WALWORTH, *Circuit Judge*, said the day laid in the indictment was not material, and the offence may be proved to have been committed on any other day, before or after that time.

The jury, without leaving the bar, acquitted the prisoner on the merits.

CLINTON OYER AND TERMINER, July 2, 1823. Before *Walworth*, Circuit Judge, and the County Judges.

THE PEOPLE vs. WILLIAM WINTERS.

A husband has no right to beat his wife or to inflict corporal punishment upon her; but he may defend himself against her, and may restrain her from acts of violence towards himself or towards others.

The prisoner was indicted for an assault and battery on his wife. It appeared on the trial that the prisoner attempted to correct one of his children, and that his wife interfered and made such a noise as to alarm the neighborhood. She testified that he struck her on the head with his hand, and bruised her severely.

C. Nichols, for the prisoner, contended that the husband had a right to give his wife moderate correction.

J. Palmer, (District Attorney,) for the people.

WALWORTH, *Circuit Judge*, said a husband has no right to beat his wife or to inflict punishment upon her. But he may defend himself against her, and may restrain her from acts of violence towards himself or towards others, for he is accountable for her acts which injure others.

The jury being satisfied by other testimony that the prisoner had done nothing more than was necessary to defend himself, in this case, rendered a verdict of *not guilty*.

CLINTON OYER AND TERMINER, July 4, 1823. Before *Walworth*, Circuit Judge, and the County Judges.

THE PEOPLE *vs.* JOSEPH BOUJET.

Where, on a trial for burglary, the articles of property alleged to have been burglariously stolen were found in the possession of M., an alleged accomplice of the prisoner, and were brought to the prosecutor and identified by him, proof of the confession of the prisoner that he and M. went to the house of the prosecutor together, and that the prisoner waited without while M. entered the house through the window and stole the articles, and that they then went away together, is sufficient evidence of the identity of the articles and the guilt of the prisoner.

Where two persons acted in concert in planning and executing a burglary, and one of them entered the house and brought out the property while the other waited on the outside, both were held to be guilty of a breaking and entering.

The prisoner was indicted for burglary, committed in the dwelling house of Elias Dewey.

Dewey proved the breaking of his house in the night time, and that a gun and hat were stolen out, which he did not miss till afterwards. He heard the prisoner was taken, and that his gun and hat were in the possession of N. Nichols. He sent his son for them, and he returned with them. The gun and hat were found in the possession of M. Moran. Nichols testified that he delivered them to the son of Dewey after the arrest of the prisoner, and that the prisoner confessed that he and Moran went to the house of Dewey together; that he waited without, while Moran entered the house through the window and stole the hat and gun, and that they both went off together.

C. Nichols, for the prisoner, objected that there was not sufficient proof of the identity of the articles, and the prisoner was not guilty of the burglary.

J. Palmer, (District Attorney,) for the people.

WALWORTH, *Circuit Judge*.—Under the circumstances of this case, there is sufficient proof of the identity of the articles, con-

The People v. Cook.

nected with the confessions of the prisoner, to prove that the felony was committed, without producing the son of Dewey, who took the gun and hat from Nichols and delivered them to his father. The breaking and entering the house by Moran, was in law a breaking and entering by both; and the prisoner is guilty of burglary as much as if he had entered in person and stolen the goods.

Prisoner convicted of burglary.

WARREN OYER AND TERMINEE, July 11, 1823. Before *Walworth*, Circuit Judge, and the County Judges.

THE PEOPLE vs. DAVID S. COOK.

Stealing a promissory note was not felony at common law, and an indictment for such stealing should conclude *contra formam statuti*. (a)

On an indictment for a second offence of *petit larceny*, charged to have been committed after a conviction for the first offence before a court of Special Sessions, the indictment must show that the court of Special Sessions had jurisdiction to try the first offence.

In setting out the proceedings of a court of inferior or limited jurisdiction, the indictment should always state enough to show that such court had jurisdiction of the case.

The prisoner was indicted, 1st, for stealing a \$2 promissory note, commonly called a bank note, &c.

2d. For robbing a dwelling house, some person being therein.

3d. For a second offence of *petit larceny*, after a conviction before three justices, at a court of special sessions, for a previous offence.

The counsel for the prisoner objected to any evidence being given under the *first* and *third* counts, because the *first* count did not conclude "against the form of the statute," and because

(a) In this state, it is provided by 2 *Rev. Stat.* 723, that no indictment shall be deemed invalid, by reason of omitting to charge any offence to have been committed contrary to a statute, although the offence may have been created by statute.

The People v. Muldoon.

the court of Special Sessions, described in the third count, had not jurisdiction, &c.

The Court, WALWORTH, *Circuit Judge*, presiding, decided that stealing a promissory note was not an offence at common law. That the count for stealing it should therefore conclude *contra formam statuti*, and the first count was therefore defective. That in an indictment for a second offence, the count must contain sufficient to show that the court, before which the conviction for the first offence took place, had jurisdiction to try for that offence. That in this case, the indictment was defective because it did not show that the offence was committed within the county where the court was holden, or that the accused requested a trial by the justices, or that he refused to give bail, without which the special sessions had no jurisdiction of the cause. In setting out the proceedings of a court of inferior or limited jurisdiction, the record should always state sufficient to show that such court had jurisdiction in the case.

WASHINGTON OYER AND TERMINER, July 16, 1823. Before
Walworth, Circuit Judge, and the County Judges.

THE PEOPLE vs. WILLIAM MULDOON.

On the trial of an indictment for an assault and battery in resisting the jailer, the prosecutor must produce the mittimus, to show that he had a legal right to detain him.

The prisoner was indicted for an assault and battery upon the jailer.

It appeared on the trial, that the prisoner was in the room with other prisoners, who had been brought from the Salem jail to this court at Sandy Hill, by the jailer. Being requested by the jailer to go into another room, the prisoner refused to

The People v. Porter.

go, and the jailer attempting to coerce him to do so, he resisted and struck the jailer.

J. Willard, for the prisoner, objected that the prosecutor had not shown any right to detain the prisoner, and that such right could not be proved by parol.

WALWORTH, Circuit Judge.—The prosecutor must produce the mittimus to show the prisoner was legally in his custody. For aught that appears, the prosecutor was illegally detaining the prisoner, and if so, he had a right to resist any attempt of the prosecutor to restrain him of his liberty.

The mittimus was not produced, and the prisoner was acquitted.

WASHINGTON OYER AND TERMINER, July 17, 1823. Before *Walworth*, Circuit Judge, and the County Judges.

THE PEOPLE vs. WILLIAM PORTER.

A prisoner can not be convicted on an indictment for blasphemy, on his mere confession made out of court, that he had made use of the words charged in the indictment; the prosecutor must also show that an offence had been committed, or that blasphemous words had actually been uttered. Intoxication is no excuse on an indictment for blasphemy.

The prisoner was indicted for blasphemy, in speaking the following words: "God Almighty is a whoremaster, the Virgin Mary a damned whore, and Jesus Christ a bastard."

The public prosecutor to establish the speaking of the words, called *Alfred White*, and offered to prove by him, that in a conversation with the prisoner, he admitted to the witness that at a whortleberrying party he had made use of the expressions charged in the indictment.

WALWORTH, Circuit Judge.—This is not legal evidence to prove the offence. A person can never be convicted of a crime

The People v. Porter.

on his own confession, made out of court, without first proving a crime committed, or giving some testimony in addition to the confession, from which the court and jury can legally infer that the offence has been committed by some one. In this case, if any person heard the words spoken, his testimony should be adduced. If they were not heard by any person, no crime could have been committed, and the prisoner might as well be convicted if he had merely confessed he once thought so.

But even if this were legal evidence to prove a crime committed, the confession does not go far enough, as the prisoner did not admit that the words were spoken within the time of limitation, or even that they were spoken within this county or state.

A witness afterwards swore positively to the speaking of the same words at Root's tavern in *Hebron*, as laid in the indictment, a few minutes after the confession above mentioned had been made.

Z. R. Shepherd and *J. Willard*, for the prisoner, then offered to prove that the prisoner was so beastly drunk that he did not know what he said.

WALWORTH, Circuit Judge.—That is no excuse, and only aggravates the offence.

This witness, however, was discredited, and the jury gave a verdict of acquittal.

WARREN OYER AND TERMINER, July 18, 1823. Before *Walworth*,
Circuit Judge, and the County Judges.

THE PEOPLE *vs.* RICHARD FULLER.

That an indictment was recently found is not a ground for putting off a trial in a capital case, especially where the prisoner has been a long time in prison, charged with the offence.

It is not good ground of challenge to the array, that the jury was drawn and the panel certified by the deputy clerk, instead of the clerk, who was absent. It is not a good ground of challenge to a juror for principal cause, that he had expressed his opinion hypothetically.

Where a juror is challenged for favor, and triors are appointed, the juror himself may be sworn as a witness before them, to state or explain any facts which do not impeach his character or his motives.

Intoxication is a voluntary deprivation of reason, and can not be given in evidence, even on a trial for murder, to excuse the offender.

Where a person carelessly discharged a gun loaded with ball into the highway, when it was quite dark, and thereby unintentionally killed a person who was passing, and whom he did not see, such killing was manslaughter at common law.

The prisoner was indicted for the murder of Andrew Fish, and was tried at the Warren Oyer and Terminer before *WALWORTH*, Circuit Judge, and two Judges of the County Court.

Wm. Hay, Jun., and *R. Weston*, of counsel for the prisoner, moved to put off his trial on the ground that the indictment had been recently found, at the court then sitting.

THE COURT decided that as the prisoner had been committed many months before, on the charge of murder, on the finding of the coroner's inquest, the recent finding of this indictment was no cause for putting off the trial.

The counsel then challenged the *array*, on the ground that the jury was drawn and the panel certified by the deputy clerk, in the absence of the clerk.

THE COURT decided that in the absence of the clerk, the deputy might lawfully draw the jury and certify the panel

The People v. Fuller.

That the statute authorizing clerks to appoint deputies, (1 R. L. 523,) was meant to provide for a case of vacancy in the office, and to make it compulsory on the clerk to have a deputy. But the clerk at common law might also execute the office by deputy; and the case of the clerkship of Ulster county was mentioned, which, before the revolution, had been granted to Gov. George Clinton for life, and was executed by P. Tappen, his deputy, during the life of Gov. Clinton.

The prisoner thereupon, for the purpose of evading a trial at that time, challenged peremptorily twenty of the jurors, and challenged others for cause, &c., as having made up and expressed an opinion as to his guilt or innocence.

THE COURT decided that where a juror had no knowledge of the facts except from hearsay, and had only expressed an opinion hypothetically, as, "*If what I have heard is true,*" &c., he was not thereby rendered incompetent.

A juror was challenged for favor, and triors were appointed by the court; a witness on the part of the prisoner testified that in a conversation with the juror, a few days previous, he understood him to express a decided opinion as to the guilt of the prisoner.

The counsel for the people asked that the juror might be sworn and testify before the triors, to explain the conversation which was testified to by the witness.

THE COURT decided the juror might be sworn for that purpose, as the question did not go to impeach his character or motives, in any way. He was sworn, and testified that he never had made up any opinion as to the guilt or innocence of the accused, and had not expressed any opinion to his knowledge, except hypothetically, as, "*If what he had heard was true,*" &c. And if the other witness had understood him to express a positive opinion, he had either misunderstood him, or that he, the juror, had said what he did not intend to say; and that he had no recollection of ever saying so. The triors, after consulting,

The People v. Fuller.

together a few minutes, decided that the juror was indifferent between the prisoner and the prosecution, &c.

The counsel for the prisoner offered to prove that he was intoxicated at the time of the commission of the offence.

THE COURT decided that the evidence was improper; that intoxication was a voluntary deprivation of reason; that if a person under the influence of liquor does an act which would be a crime if he were sober, the intoxication is an aggravation of the offence, and can not be given in evidence in mitigation of the guilt of the prisoner.

The prisoner discharged his gun, loaded with a ball, into the public highway about 9 o'clock in the evening, when it was quite dark, and killed Fish, who was in the highway, a few feet only from the muzzle of the gun; and if he shot him intentionally, as the evidence tended to show, there could be no doubt but that he was guilty of murder.

THE COURT charged the jury, that if they should be of opinion that the prisoner was not guilty of murder, but that he shot the deceased unintentionally, without knowing that he was there, still it was not *excusable homicide*. For the act of firing into the street in the manner described, was gross carelessness, and was calculated to endanger the lives of persons passing along the street. That killing a human being by such carelessness, would constitute the crime of *manslaughter*.

The jury found the prisoner guilty of manslaughter only, and he was sentenced to fourteen years' imprisonment in the state prison.

MONTGOMERY OYER AND TERMINER, July 21, 1823. Before
Walworth, Circuit Judge, and the County Judges.

THE PEOPLE *vs.* ANDREW WILLEY.

That the prisoner was intoxicated is no defence to an indictment for perjury.

The prisoner was indicted for perjury. It appeared that in June, previous to the trial, he came in company with one or two other persons, from the county of Schenectady to a magistrate in the county of Montgomery, to whom he was a stranger, and made a complaint against one James Thomas, for the murder of a man on board of a sloop on the Mohawk river, in that county, and he testified to a number of facts, positively charging Thomas with the crime. It appeared by a number of witnesses that the whole story was an entire fabrication.

B. Chamberlin, for the prisoner, offered to prove that he was intoxicated at the time he came before the magistrate and obtained the warrant; and the counsel stated that such a defence had been admitted by Chief Justice Spencer in a case of perjury.

W. I. Dodge, (District Attorney,) for the people.

WALWORTH, *Circuit Judge*.—It is a general rule in criminal prosecutions, that the intoxication of the accused is no defence and forms no excuse for the commission of a crime (*a*). It has been frequently so decided even in the case of murder, though *Judge Van Ness* once permitted the fact of intoxication to be proved to rebut the presumption of malice, where a man had been killed in a sudden affray, and to show that the act was the effect of sudden passion, and not of premeditation. But the correctness of that decision has been much doubted.

(*a*) 2 Coke Lit. 247; 1 Plow. Rep. 19; 4 Coke's Rep. 125; 1 Hawk. P. C. 2; 1 Hale's P. C. 32; Burn's L., title "Alehouse," 14, and "Lunatic."

The People v. Hewit.

There can be nothing in a case of barefaced perjury, like the present, to take it out of the general rule. There must be some mistake about the case said to have been decided by Chief Justice Spencer. But even if he did so decide, it was contrary to the uniform decisions of courts in relation to such a defence, and therefore can not be the law.

The jury, without leaving the bar, found the prisoner guilty, and he was sentenced to ten years' imprisonment in the state prison.

SARATOGA OYER AND TERMINER, July 29, 1823. Before *Walthworth*, Circuit Judge, and the County Judges.

THE PEOPLE vs. ERIAL HEWIT.

On the trial of an indictment for forgery, where the witnesses disagree as to the genuineness of the signature, comparison of hands is admissible, (a) and the prisoner may prove by the cashier of a bank or others, who are in the habit of examining signatures with a view to detect forgeries, that the instrument alleged to be forged is not a simulated hand.

The prisoner was indicted for forging a note against one Elisha Oakley, for twenty-five dollars. Oakley testified that he gave to the prisoner a note for \$5, of the same date as the one produced, but that he never gave one for \$25, and that his name subscribed to the note was not his signature. Several witnesses stated that they were acquainted with the handwriting of the prosecutor, and believed it was not his handwriting. On the part of the prisoner, several witnesses testified that they believed it was the handwriting of the prosecutor.

The counsel for the prisoner then produced a number of writings, to which the name of the prosecutor was subscribed,

(a) NOTE.—It is usual, in the ecclesiastical courts, to admit comparison of handwriting, in contests respecting the execution of wills. *Beaumont vs. Perkins*, *Heath vs. Watts*, *Rexley vs. Rivet*, 1 *Phillimore's Rep.* 75 to 80, *Goodtitle ex dem. Rivet vs. Eraham*, 4 *Term R.* 497 in B. R.

The People v. Hewit.

which signatures were admitted to be genuine, and offered to prove by comparison with the signature on the note that it was in the same handwriting. The prisoner also offered to prove, by the cashier of a bank, that the signature to the note was a genuine signature and not a simulated one.

WALWORTH, *Circuit Judge*.—It is laid down as a general rule of evidence, that comparison of handwriting is not to be permitted. But this rule must be taken with many exceptions. I apprehend the true rule to be that comparison of hands is not to be admitted as direct evidence, to prove or disprove the genuineness of a signature or writing. But in a case where the ordinary evidence of that fact is so contradictory as to leave it doubtful, then such evidence may be given; as in this case, where many witnesses equally well acquainted with the handwriting of the prosecutor, have formed different opinions of the genuineness of the signature, from their knowledge of his handwriting. From my own experience, I am satisfied that the comparison of handwriting is frequently more to be relied on, in such cases, than the ordinary evidence which is given as to handwriting.

The prisoner may also prove by the cashier who has been in the habit of examining the signatures to notes and bank bills, to ascertain their genuineness, that the signature to this note is not a simulated hand. It is such evidence as is given every day on indictments for passing counterfeit money.

Prisoner acquitted.

SARATOGA OYER AND TERMINER, July 29, 1823. Before *Walworth*, Circuit Judge, and the County Judges.

THE PEOPLE *vs.* GILBERT WOOD.

If a servant, entrusted with the care of a horse of his master, takes it from the stable of his master, with intent to run away with it, he is guilty of stealing. The horse in the stable of the master is in the actual possession of the master and not of the servant.

The prisoner was indicted for horse stealing. He was in the employ of the owner of the horse, as a common laborer; and it was part of his duty to water and feed the horse, which was kept in a stable. In the absence of the owner and his family, the prisoner went to the barn and took out the horse and saddled and bridled him, went to the house and took from thence a coat and pantaloons belonging to the prosecutor, and rode off. The prosecutor returned, and missing the horse, &c., he pursued the prisoner and overtook him about ten miles from the place from which the horse had been taken, and evidently running away with the horse.

The counsel for the prisoner insisted that as the prisoner had been entrusted with the care of the horse, he should have been indicted for embezzling, and that he was not guilty of stealing.

WALWORTH, *Circuit Judge*.—There can be no pretence in this case, that the horse was in the legal possession of the prisoner at the time it was taken. The horse in the stable was not only in the constructive but in the actual possession of the owner. It was there the offence was committed by the prisoner in taking the horse from the stable, with intent to run away with it. It was therefore never legally in his possession.

Prisoner convicted.

SARATOGA OYER AND TERMINER, July 29, 1823. Before *Walworth*, Circuit Judge, and the County Judges.

THE PEOPLE *vs.* JOHN SNYDER

A person indicted for burglary in breaking and entering, &c., with intent to steal, and then and there stealing, &c., may be acquitted of the burglary and convicted on the same count for the simple larceny.

The prisoner was indicted for burglary for breaking and entering the dwelling house of William Stratton, at Saratoga Springs, and stealing boots, shoes, &c.

The place in which the felony was committed was a room in the dwelling house of Stratton, occupied by him as a shoe shop. There was no communication between the shop and the other part of the house, which was occupied by Stratton's family, except by an outside door which opened into a yard surrounding the whole building. The whole building was erected together under the same roof; and some of the rooms occupied by the family were above and some on the same floor with, and some below the room occupied as a shop.

S. G. Huntington, for the prisoner, objected that the offence was not burglary, and that as there was no count in the indictment for petit larceny, the prisoner must be acquitted.

WALWORTH, Circuit Judge.—The indictment in this case includes the felonious stealing of the boots and shoes; and it is a general rule, that where an indictment for felony includes a felony of a lesser degree, the prisoner may be acquitted of the greater and convicted of the lesser offence. As in an indictment for petit treason, the prisoner may be acquitted of that offence and convicted of murder or of manslaughter. And in an indictment for burglary, where a felonious taking of the goods is also charged to constitute the crime of burglary, the prisoner may be acquitted of the breaking and entering the dwelling house in the night time, and may be convicted of the simple larceny.

The People v. Vinegar.

The court is also of opinion that the shop, as it was situated in this case, constituted a part of the dwelling house. It was under the same roof, built at the same time, occupied by the same person, was nearly surrounded by rooms occupied by his family, and the whole was separated from the street by a common enclosure (a).

Prisoner convicted of burglary.

SARATOGA OYER AND TERMINER, July 30, 1823. Before *Walworth*, Circuit Judge, and the County Judges.

THE PEOPLE vs. SAMUEL VINEGAR.

The principles by which a jury are to be governed, on an indictment for an assault and battery with intent to commit murder, are the same as on an indictment for murder.

Where the prisoner was the aggressor, and commenced the attack and made use of such weapons, &c., as were calculated to endanger life, it was held that malice would be inferred, and that the fact that the prisoner was in the heat of passion, would not mitigate the offence into a lesser crime.

The prisoner was indicted for assault and battery upon Richard Van Der Carr, with intent to murder him.

The prisoner and Van Der Carr were at work in a store in Waterford, carrying out wheat which Samuel Sillman was measuring up. Van Der Carr, without being in anger, was calling the prisoner by bad names and endeavoring to irritate him; and the prisoner had once or twice clinched him, but they had been parted by the person who was measuring the grain. The prisoner had become very angry; and after they had been parted the last time, as Van Der Carr turned to go from him, the prisoner seized a nail hammer which lay near him, and running up behind him struck him with it on the

(a) *Rex vs. Gibson et al*, 1 Leach, 357; *Archbold*, 166.

The People v. Vinegar.

back of his head and knocked him down; and he gave him a second stroke before Sillman, the other person present, discovered him. Sillman then attempted to get the hammer from him, but the prisoner struck him and drove him back, and gave to Van Der Carr a third stroke; and he was in the act of repeating it when his arm was arrested by another person who came to their assistance. A surgeon, who examined the wounds, testified that each blow of the hammer had broken through Van Der Carr's skull; and that the ordinary effect of such blows would be to destroy life.

G. W. Kirtland, for the prisoner, contended that he was not guilty of assault and battery with intent to murder, as it was in the heat of passion.

WALWORTH, *Circuit Judge*, charged the jury that the principles by which their decision was to be governed, were the same as on an indictment for murder. But it was not every case of taking life in a sudden affray, or in the heat of passion, which could be mitigated into manslaughter. Malice might be, and frequently was inferred from the particular circumstances of the case; as where the prisoner commenced the attack and made use of such weapons as would be likely to endanger life. In this case, if the prisoner intended to take the life of Van Der Carr, he was guilty of the offence charged in the indictment, and would have been guilty of murder if he had succeeded.

Verdict, guilty.

FRANKLIN OYER AND TERMINER, August 21, 1823. Before
Walworth, Circuit Judge, and the County Judges.

THE PEOPLE *vs.* REUBEN BANKER.

On the trial of an indictment, the counsel for the prosecution has the right to introduce in evidence the examination of the prisoner taken before the committing magistrate, although it appears by such examination that no confessions were made by the prisoner, and that he refused to answer or to give any account of the transaction in question.

The prisoner was indicted for passing counterfeit money. He had passed several bills and had others in his possession. He was a transient person and pretended to be traveling. There were many facts to induce a belief that he knew the bills to be counterfeit, and that he was a retailer of counterfeit bills.

The counsel for the people offered his examination, taken before the magistrate, in evidence.

The counsel for the prisoner objected to the evidence, on the ground that no confessions or admissions whatever were made before the justice, and that the bare refusal of the prisoner to answer could not be evidence against him.

WALWORTH, *Circuit Judge*.—The proceedings before the magistrate are always legal evidence of what actually took place on such examination. The examination is taken as well for the purpose of enabling the accused to explain the unfavorable circumstances which appear against him as to obtain a knowledge of those facts which may tend to convict him of guilt. It is true that the person arrested and brought before a magistrate for examination is not bound to make any answer whatever, either to show his guilt or innocence of the charge alleged against him. But if he does refuse to give any account of himself, or of the transaction, the court and jury on his trial have a right to know that fact, in a case like the present, where the offence must in all cases depend either upon the admission of the party or upon circumstantial evidence. Such a refusal alone can not be sufficient to convict any person of a crime.

The People v. Bates.

but if there are strong circumstances against a prisoner, and he has refused to improve this opportunity, which the law gives him, to explain those circumstances, he can not complain if the jury presume they could not be explained consistently with his innocence.

FRANKLIN OYER AND TERMINER, August 22, 1823. Before
Walworth, Circuit Judge, and the County Judges.

THE PEOPLE vs. JOHN BATES.

Assault and battery, with intent to commit a rape, may be proved without the testimony of the person injured.

Where there is reason to believe that the person injured is kept out of the way by the prisoner or his friends, and the assault and battery, &c., are proved by persons who heard the cries of the woman and witnessed the transaction from a distance, the jury may infer the intent from the circumstances as proved. ‘

The prisoner was indicted for an assault and battery, with an intent to commit a rape on *Anne Cubes*, who was not present at the trial. She and her husband were transient persons and foreigners, and there were strong reasons to believe they had been hired to go off by the friends of the prisoner. *Brown*, the principal witness, who resided in Canada, had been offered a sum of money if he would not appear against the accused. *Brown* testified that in passing along the road, in a retired place near evening, he heard the cries of a woman for help. Passing over a small hillock in the road, he discovered the prisoner who had hold of *Mrs. Cubes*, and was apparently attempting to drag her into a small piece of woods adjoining the road. She was screaming and appeared much frightened. When the witness came up, she requested him, though a stranger, to go with her to her residence. The prisoner ordered the witness to be off; who thereupon called for assistance to others who came in sight, and the prisoner on discovering them, fled into the woods.

The People v. Kirby.

J. Parkhurst, of counsel for the prisoner, contended that he could not be convicted for this offence without the testimony of Mrs. Cubes, upon whom the rape was charged to have been attempted.

WALWORTH, *Circuit Judge*.—The testimony of the person injured is not absolutely necessary in a case of this kind; which differs materially from the case of an actual rape. This is only a question of intention. That question the jury must determine from the circumstances of the case. And I can hardly imagine how they could be made stronger, if the woman was herself a witness. If she could explain these circumstances so as to make them consistent with the innocence of the prisoner, it was his duty to procure her attendance at the trial.

The jury found the prisoner guilty, and he was sentenced to seven years' imprisonment in the state prison.

ST. LAWRENCE OYER AND TERMINER, August 28, 1823. Before
Walworth, Circuit Judge, and the County Judges.

THE PEOPLE vs. WILLIAM KIRBY.

Every willful and intentional taking of life of a human being without a justifiable cause, is murder at common law, if done with deliberation and not in the heat of passion, and legal malice is always implied in such cases.

It is not necessary to prove express malice or ill will against the person killed; thus when children were drowned to prevent their coming to want, it was held that the law would imply malice from the illegality of the act.

Every person is presumed to be sane until the contrary appears.

The prisoner was indicted for the murder of John Hughes, a boy four years old.

The facts, as they appeared on the trial, were as follows: The prisoner with his wife and three children, the two oldest being children of his wife by a former husband, came to the village of Ogdensburgh from Canada in search of employment, about four days before the alleged murder, and put up at a public

The People v. Kirby.

house. About 10 o'clock in the morning of the fourth day after his arrival at Ogdensburgh, he took the two youngest children (his own daughter about two years old, and his stepson about four years old.) to the bridge which crosses the Oswegatchie river in the village, and threw them into the river and they were then immediately carried under the ice and drowned. A woman who resided near the bridge, saw the transaction from her window and came out and asked him whose those children were, and he replied they were his. He then went deliberately into a law office near by and inquired for a magistrate, and being informed there was one present, he said he had just drowned his two children, and wished to be committed to jail before his wife found it out. He was committed for examination, and in the afternoon was examined before the magistrate, and stated, in substance, that he drowned the children in the manner above stated, and that he had it in contemplation to drown them for about a week previous. The children had given him no offence, but he drowned them because he thought it better for them to go into eternity than to stop in this world. He intended to destroy himself with the children, but at the moment he was about to do it, the thought struck him that suspicion might rest on his wife, and he determined to stay to prevent such suspicion. That for the last six months he had determined to destroy himself, and believed he should have been happy if he had drowned himself with the children. He was educated a Christian and believes in the gospel.

Prisoner was cool and collected, and to the question, did he not know he was commanded by the scripture not to kill, he replied, "The Lord did not destroy Cain."

A physician attended the examination of the prisoner, and endeavored in a variety of ways to ascertain, if possible, whether he was insane generally or partially, or on any particular subject, and he could discover nothing to induce a belief that the prisoner was insane. The sheriff and jailor, in whose custody the prisoner had been for eight months before the trial, testified that during that time he had discovered nothing like insanity, or to induce him to think he was not in the possession

The People v. Kirby.

of his senses like other men. The sheriff also produced several quires of manuscript, written by the prisoner on religious subjects while in jail, which contained no evidences of mental derangement, but, on the contrary, exhibited much strength of reasoning and showed that the prisoner must have received a good education.

Several witnesses from Canada, where the prisoner had worked the previous summer, testified that he acted rather singularly, was frequently in a reverie, and was writing a considerable part of the time when not employed at labor. His family were then absent and he appeared very anxious to have them come to him, and when they did come, he appeared very affectionate to his wife and the children. He sometimes talked of destroying himself, and one night he went out, as he said, for the purpose of drowning himself. The family where he boarded became alarmed, and were out several hours in pursuit of him, along the shores of the river, but did not find him. During the night he got into the house through the window, and in the morning he said if the tavern keeper had given him a gill of liquor he should have then been in eternity, but he would not give it him. At another time he told a British sergeant he was a deserter, and went with him to the fort to deliver himself up, but returned after two or three days. One of the clergymen of the place, who had frequently visited prisoner in jail since his confinement, had conversed with him on religious subjects, thought some of his ideas very singular and his mind sometimes appeared confused. One time he asked witness if he thought sin would damn a man, and on witness answering in the affirmative, he replied he thought it was not sin but unbelief that damned men. Witness told him God hated sinners with a perfect hatred, and he said he did not believe it. That it was sin God hated, but he did not hate sinners. These were the ideas he thought singular, and which induced him to think prisoner's mind was not perfect. He generally appeared serious and solemn, but would sometimes indulge in ill-timed laughter when they were conversing on serious subjects.

The People v. Kirby.

F. Atwater and *J. Kirtland*, the counsel for the prisoner, contended that there was sufficient evidence to satisfy the jury the prisoner was laboring under mental derangement. But if they were not satisfied of that fact, the prisoner could not be convicted of murder, for there was no evidence of malice against the children, but, on the contrary, it appeared he was much attached to them.

WALWORTH, *Circuit Judge*, charged the jury that if they were satisfied the prisoner was in the perfect possession of his mental faculties, he was guilty of murder, although he had no express malice against the children; that if he intended to destroy himself, and drowned the children to prevent their coming to want, or to relieve his wife from the burden of supporting them, the law implied malice from the illegality of the act. Every willful and intentional taking the life of a human being, without a justifiable cause, is murder, if done with deliberation and not in the heat of passion, and legal malice is always implied in such cases.

That the important question in this case was, whether the prisoner was under the influence of mental derangement at the time the act was done. If such was the case, he was not guilty of any crime whatever. But if he was in the perfect possession of his senses, it was murder. That this was a question of fact which belonged to the jury exclusively to decide; that every person was presumed to be sane until the contrary appeared; that there were several circumstances in this case from which an inference might be drawn that the prisoner had not his perfect mind. And the court referred to the time, place and manner of the act and the particular circumstances attending it, as some of the strongest evidences in the case to show a deprivation of reason.

The jury retired, and after being out about thirty minutes, returned a verdict of guilty against the prisoner.

The circuit judge, however, doubting the sanity of the prisoner, reported the case to the governor, who commuted the punishment.

ONEIDA OYER AND TERMINER, December 17, 1823. Before
Walworth, Circuit Judge, and the County Judges.

THE PEOPLE vs. JOHN P. HARTWELL.

Verbal agreements as to proceedings upon an indictment made by parties and their counsel, in the presence of a court of Oyer and Terminer, will be enforced, if the court has jurisdiction of the case to which they refer. But jurisdiction of an indictment pending in another court can not be conferred by such an agreement.

But where, under such an agreement, the prisoner gave bail to appear at the next court of Oyer and Terminer, the court refused to discharge him from such recognizance, on the ground of the general jurisdiction of the court over all crimes and offences, and required the prisoner to give bail to appear in the court in which the indictment was pending.

The prisoner had been indicted at the court of General Sessions of the Peace in Oneida county, and the indictment had been removed by *certiorari* into the Supreme Court, (a) but the *certiorari* had not been returned. At a former term of this court, a verbal agreement had been made by the public prosecutor and the counsel for the prisoner, in the presence of the court, that the indictment should be tried in the Oyer and Terminer at the present term, and the defendant gave bail for his appearance at this time.

Jonas Platt, of counsel for the prisoner, moved to put off the trial of the cause on an affidavit of Hartwell that the agreement had been entered into by his counsel without his consent, and that he was not ready for trial and had not come prepared, on the supposition that the cause could not be tried. From the facts shown on the part of the public prosecutor, there was reason to believe the only object of the prisoner was delay.

WALWORTH, *Circuit Judge*.—Verbal agreements, made in the presence of the court, will be enforced; but the great dif-

(a) A *certiorari* to remove an indictment from the General Sessions, is abolished. (2 Rev. Stat. 732.)

The People v. Hartwell.

ficulty in this case is that the court had not jurisdiction in the case. The indictment being removed from the sessions by certiorari, it is in the Supreme Court, and this court can only have jurisdiction of the indictment by its being sent here by *procedendo*, or *certiorari*, and thereby leave the indictment as it was before the filing of the certiorari. At the time the agreement between the parties was made in the presence of the last court of Oyer and Terminer, that court not being possessed of the cause, the whole proceeding was *coram non judice*, and could not give jurisdiction to the court.

Platt insisted that the prisoner should be discharged from his recognizance, on the ground that the court had no jurisdiction to take it, having no jurisdiction of the case.

WALWORTH, *Circuit Judge*.—Although the court of Oyer and Terminer had no jurisdiction over this particular indictment, which had been removed into the Supreme Court, yet it had general jurisdiction over all crimes and offences, and might take surety for the peace, or a recognizance to appear at the next court of Oyer and Terminer to answer any indictment which might be found. He has voluntarily entered into a recognizance, and he can not, under the particular circumstances of this case, be discharged therefrom, unless he will consent to give new bail to appear in the Supreme Court from time to time, and at the next Circuit Court in this county, where the trial on this indictment might be had.

The prisoner gave new bail to appear at the next Circuit Court, to have his trial on the indictment and to appear in the Supreme Court on the return of the *postea*, and gave a written stipulation to plead the general issue to the indictment in the Supreme Court, forthwith, and was thereupon discharged from his former recognizance.

ONEIDA OYER AND TERMINER, December 18, 1823. Before
Walworth, Circuit Judge, and the County Judges.

THE PEOPLE *vs.* PETER BURNS.

On the trial of an indictment, it is competent for the public prosecutor to prove, by parol, what the prisoner testified to on a complaint made by him before a magistrate against a third person.

Where it appeared that such complaint was made, and evidence given by the prisoner against others concerned in the commission of the crime, on the advice of his stepfather, and on the assurance that he would be admitted as "State's evidence," it was held the evidence ought not to be excluded on the ground of admissions obtained by inducements.

The prisoner was indicted for passing counterfeit money, and the cause was tried at the Oneida Oyer and Terminer, in December, 1823.

S. Beardsley, (District Attorney,) for the people

J. A. Spencer, for the prisoner.

The public prosecutor offered parol evidence of what the prisoner testified before a magistrate on making a complaint against one Dana, which evidence was objected to by prisoner's counsel.

WALWORTH, *Circuit Judge*.—There is no law requiring the complaint to be in writing. When the accused is brought up for examination, the justice is to reduce to writing the substance of his examination and the testimony of the witnesses, but this does not extend to the original complaint. If the complaint had been reduced to writing and signed by the party, it might be the best evidence of what he stated. But the written memorandums of the justice, if produced, could only be used to refresh his memory, and the evidence would still be by parol. Objection overruled.

The counsel for the people then offered in evidence the examination of the prisoner, taken according to law, before the

The People v. Burns.

magistrate. This was objected to by the prisoner's counsel, who offered to prove that inducements had been held out to the prisoner to obtain his confession; and for this purpose called the stepfather of the prisoner, who testified that he advised the prisoner to go to the magistrate and make a complaint against others concerned, and that he would be admitted as state's evidence. It further appeared from the testimony of the prosecutor and magistrate, that the stepfather had taken great pains to screen the prisoner from justice; that he had in one instance enabled him to elude the pursuit of the officer who was endeavoring to arrest him; that he had told the magistrate the prisoner could bring out a large gang of counterfeiters, (which was not true.) The justice intimated to him that the prisoner had better surrender himself upon the warrant, but gave no further encouragement.

WALWORTH, *Circuit Judge*.—The examination in this case must go to the jury. Under all the circumstances it is a proper case for them to decide what credit is to be attached to the testimony of the stepfather, who is called on the part of the prisoner. This is an entirely different case from those in which inducements are held out by the prosecutor, or by the officers of justice to the prisoner, for the purpose of obtaining confessions of his guilt.

The prisoner was convicted, but was recommended by the court for a pardon, that he might be a witness against another person, who appeared to be a wholesale dealer in counterfeit money.

ONEIDA OYER AND TERMINER, December 19, 1823. Before
Walworth, Circuit Judge, and the County Judges.

THE PEOPLE *vs.* WALTER HOAG.

Forging a receipt for a note of hand, which when paid will be in full, &c., does not come within the provisions of "the act to prevent forging and counterfeiting," passed April 2, 1813, but it is a misdemeanor at common law.

The prisoner was indicted and convicted for forging a receipt in the words following:

"Received of Walter Hoag his note of hand for eight dollars, when paid it will be in full of debt, dues and demands of all kinds whatever up to this date.

Pompey, October 8th, 1819.

EBENEZER CARR."

The prisoner had forged the receipt and offered it in evidence on a trial at the circuit to prevent a recovery on a note given previous to the date of the receipt.

Fortune C. White, the counsel for the prisoner, moved in arrest of judgment, on the ground that the receipt mentioned in the indictment did not come within any of the provisions of the "act to prevent forgery and counterfeiting," passed April 2, 1813.

S. Beardsley, (District Attorney,) for the people

WALWORTH, *Circuit Judge*.—The provisions of the act extend to *any acquittance or receipts, either for money or goods, or any accountable receipt for any bill, note or other security for the payment of money*. But the receipt mentioned in this indictment does not come within either of these descriptions. It has been frequently decided by our courts that the giving of a promissory note was not an acquittance or discharge of the debt. This is undoubtedly a *casus omissus* in the statute, and not being a felony at common law, the prisoner can not be impri-

 Low v. The People.

soned in the state prison. But the offence of which the prisoner is convicted is a misdemeanor^(a) at common law, and the words against the form of the statute in the indictment may be rejected as surplusage, and judgment given against him for the common law offence.

The prisoner was sentenced to pay a fine of \$25, and be imprisoned thirty days in the county jail, he having already been long in confinement.

SUPREME COURT. Albany General Term, December, 1848
Harris, Watson and Wright, Justices.

EPHRAIM M. LOW, pl'ff in error *vs.* THE PEOPLE, def'ts in error.

The statute makes "bank notes" and not "bank bills" the subject of larceny.

But where the property stolen was called in the indictment "bank bills," it was held sufficient, bank notes being commonly called and known as bank bills.

It is not sufficient, in an indictment, to describe the property stolen as "sixty dollars in bank bills, current money, of the value of sixty dollars," or "bank bills, being current money of the State of New York, of the value of sixty dollars." The number of bills stolen should be stated.

On the trial of an indictment for larceny, alleged to have been committed in stealing bank notes, the jury must be satisfied from the evidence of their genuineness; and where the court refused to charge that the prisoner ought to be acquitted, unless the evidence showed their genuineness, it was held to be erroneous, and the prisoner having been convicted, the conviction was reversed and a new trial ordered.

Error from the Oyer and Terminer of Ulster county, where Low was convicted of grand larceny. The indictment contained five counts, describing the property as follows: 1st count, one pocket book of the value of 50 cents, and \$60 in bank bills, current money, of the value of \$60. 2d count, one pocket book of the value of 50 cents, and (6) six bank bills of the

(a) See the King *vs.* Ward, 2 Ld. Raymond, 1461; 1 Strange, 12; 1 Salk 342; 2 East P. C. 862.

Low v. The People.

value of ten dollars each, current money of the State of New York. 3d count, one pocket book of the value of 50 cents; two bank notes of the value of \$10 each; three bank notes of the value of \$5 each; three bank notes of the value of \$3 each; two bank notes of the value of \$2 each, and three bank notes of the value of \$1 each. 4th count, one pocket book of the value of 50 cents; fifteen notes for the payment of money, commonly called bank bills, of the value of \$5 each, and fifteen other notes for the payment of money, commonly called bank bills, of the value of \$3 each. 5th count, one pocket book of the value of 50 cents, and its contents, to wit, bank bills, being current money of the State of New York, of the value of \$60.

The evidence tended to show that in August, 1847, Brodhead Van Leuven, the complainant, received some \$74 in bank bills from one Brower, \$60 of which was in what one Stratton called current and \$14 uncurrent. Van Leuven employed Stratton to count the bills. He put the \$60 in one side of his pocket book and the \$14 in the other side. That day Van Leuven and the prisoner went in company to Rondout. Drank there a number of times; stopped on their way back to Kingston at one Myers and drank there; was at Myers' about sundown. At Myers' Van Leuven had his pocket book out and exhibited two rolls of bank bills; one roll Dubois, one of the witnesses, testified was Kingston money. He wanted a bill changed from another roll of \$13 or \$14. Both Van Leuven and Low were intoxicated, and were noisy. From Myers' they went in company to Low's oyster cellar, in Kingston; Van Leuven got some oysters, took out his pocket book to pay for them, laid it on the counter with the current money in it; Low was on the opposite side of the counter. Whilst unfolding the uncurrent money to pay for the oysters, Low said that he had change; he took the change from his pocket and paid for the oysters. At this time the pocket book and its contents were missed, and were not seen or heard of afterwards by Van Leuven.

There was no evidence as to the denomination of the bank bills alleged to have been in the pocket book, or upon what bank they were, whether of this state or not. The counsel for

Low v. The People.

the prisoner requested the court to charge the jury, 1st. That the prosecution were bound to prove the bills to have been of the particular description stated in the indictment, and in the absence of such proof the prisoner should be acquitted upon the charge of stealing the money. 2d. That they should not find the prisoner guilty of stealing the money unless the evidence showed the genuineness of the bills, or that they were upon banks of this state. Whereupon the court, as to each of said propositions, refused so to charge; but decided that the proof was sufficient under the first and last counts of the indictment, to which refusal and decision the counsel for the prisoner excepted. The jury found the prisoner guilty.

E. Cook, for prisoner.

R. F. Macauley, (District Attorney,) for the people.

By the Court, WRIGHT, J.—The counsel for the prisoner requested the court to charge the jury that the prosecution were bound to prove the bills to have been of the particular description stated in the indictment, and in the absence of such proof the prisoner should be acquitted upon the charge of stealing the money. This the court refused, and decided in substance, although the bill of exceptions does not very aptly express the meaning of the court, that the first and fifth counts of the indictment were good, and that the proof given was applicable to them. Those counts charged the stealing of bank bills generally, of the value of \$60. In the second, third and fourth counts, the number and denomination of the bills and notes were particularly described, but without any averment as to what banks issued them, or whether they were foreign or of this state. Indeed, in none of the counts is it averred that the bills alleged to have been stolen were issued by any bank of this state.

The conviction under the decision and charge of the court was had under the first and fifth counts of the indictment, and if they are bad it can not be sustained. Property, as bills and

Low v. The People.

notes, was not the subject of larceny at common law. It is made so by statute. It is provided that the felonious taking and carrying away the personal property of another, of the value of more than twenty-five dollars, shall be grand larceny; and that if the property stolen, consist of any bond, covenant, note, bill of exchange, draft, order or receipt, or any evidence of debt, or any public security issued by the United States, or by this state, or of any instrument whereby any demand, right or obligation shall be created, increased, released, extinguished or diminished, the money due thereon or secured thereby, and remaining unsatisfied, or which in any event or contingency might be collected thereon, or the value of the property transferred or affected thereby, as the case may be, shall be deemed the value of the article so stolen. (2 R. S. 679, §63, 66.) The property described in the first and fifth counts of the indictment, as stolen, is bank bills. In this respect it is urged that the indictment is bad, as bank bills are not *eo nomine* embraced in the descriptions of property made the subject of larceny by statute.

As a general rule, where an offence is created by statute, the indictment should aver such facts and circumstances as bring the case within the definition of the statutes; and in describing the offence, it is always expedient to pursue strictly the words of the statute. Formerly the courts of England, *in favorem vitæ*, were sometimes inclined to listen to and countenance very nice distinctions on the subject. A British statute made the stealing of "bank notes" a felony. In the case of *The King v. Craven*, (2 East P. C. 601,) the indictment charged the defendant with stealing "a certain note, commonly called a bank note." It was holden bad because it did not follow the description of property in the statute. Our statute describes as property, the subject of larceny, a bank note, a bill of exchange, a draft, order, or any evidence of debt, or any instrument whereby any demand, right or obligation is created. A bank bill is not mentioned, obviously for the reason that what is commonly called a bank bill, is in legal effect a bank note, and possesses the technical characteristics of a note and not of a

bill. In this case, had the indictment described the property as *bank notes*, the objection would have been obviated. To steal a *bank note* is an offence under the statute. Bank notes are ordinarily called bank bills, and are universally understood to be obligations for the payment of money on demand, passing from hand to hand as money. In common signification, when we speak of a bank bill, we allude to what is called in the statute a note, and which is issued and circulated as money; of that I think courts may take judicial notice. When an indictment, therefore, charges the stealing of *bank bills*, it is in effect the charge of larceny under the statute. The distinction would be quite too nice at this day, when the forfeiture of life does not follow a conviction, to hold that because the precise words in the statute, though the property is the same, has not been used in the indictment, the objection is fatal.

The first and fifth counts describe the property stolen as "sixty dollars in bank bills, current money of the value of sixty dollars," and "bank bills, being current money of the State of New York, of the value of sixty dollars." This, it appears to me, is too general and without precedent. The counts contain no statement as to the number of bills stolen, whether two or twenty; and number is a part of the description applicable to chattels, and should not be omitted. (*Archbold's Crim. Plead.* 45; 2 *Russell on Crimes*, 107; 2 *Hale*, 183; *Barb. Crim. Law*, 168, 169.) In an indictment for stealing bank notes, it is not necessary to set out the instruments *verbatim*. They may be described in a general manner, as a bank note; nor is it necessary to state the value of each note; but the number must be stated, and then it is sufficient to state the value in the aggregate. In respect to number, the indictment should be certain. Archbold says: "When personal chattels are the subject of an offence, as in larceny, they must be described specifically by the name usually appropriated to them, and the number and value of each species or particular kind of goods stated. (*Arch. Cr. Pl.* 49; 2 *Hale*, 182, 183.) The omission to state any number of bills stolen, may be technical; but in an indictment for

Low v. The People.

felony, when the liberty of the citizen is placed in jeopardy, there should be certainty and precision. The prosecution should at least be called upon, to a reasonable extent, to specifically apprise the defendant of the charge against him. But the doubt that I entertain on this point, is whether the defect can be urged after conviction, on a bill of exceptions. That it would have been fatal on demurrer is clear; and it is possible it might have been successfully urged on a motion in arrest of judgment. But whether advantage may be taken of it in the manner now resorted to, is perhaps immaterial to decide, as there is a remaining point in the case conclusive against the judgment.

The counsel for the prisoner further requested the court to instruct the jury that they should not find the prisoner guilty of stealing the money, unless the evidence showed the genuineness of the bills, or that they were upon banks of this state, this the court refused to charge, and, as the bill of exception states, "decided that the proof was sufficient under the first and last counts of the indictment." It was certainly necessary before the jury could convict of any thing more than petit larceny, for stealing the pocket book, that they should be satisfied that the bills alleged to have been taken had been issued by banks having an existence, and that such bills were genuine. In *The People v. Caryl*, (12 W. R. 547,) the prisoner was indicted for stealing within this state a number of bank bills, purporting to have been issued by the *Bank of Upper Canada*, and by the *Hancock Bank of the State of Massachusetts*. No proof was adduced on the trial, by the public prosecutor, to prove the existence of the banks and the genuineness of the bills. The court were of opinion that at least *prima facie* evidence ought to have been given that there were such banks in existence, and that the bills were genuine. In *The People v. Johnson*, (4 Denio R. 364,) it was held that there must be some evidence to show that the bills were genuine. In the present case, had not the point been distinctly made to the court, it might, perhaps, have been inferred that the genuineness of the bills was not to be contested before the jury. But it was made in explicit terms, and I can not understand the decision of the

The People v. Sprague.

court in any other way, than as refusing to charge that the prisoner should be acquitted of stealing the bills, though the evidence failed to satisfy the jury that they are genuine. The attention of the court having been called to it, the question of the genuineness of the bills being one for the jury, ought to have been submitted to them, and a refusal to do so was erroneous.

Judgment reversed, and new trial ordered.

KINGS OYER AND TERMINER, October, 1849. Before *Morse*, Justice of the Supreme Court, and the Justices of the Sessions.

THE PEOPLE vs. CHARLES SPRAGUE.

It is a defence to an indictment for crime, that the act complained of was done under an insane impulse, which, at the time, destroyed the capacity to distinguish between right and wrong.

On the trial of an indictment for robbing a female of her shoe, in day light, in the public street of a city, it being proved that the accused had been, for several years, and ever since an injury to his head, which it was supposed had affected his brain, in the habit of taking the shoes of females, wherever he could find them, and secreting them without any apparent object for so doing, and that insanity was a hereditary disease in the family of the prisoner on the side of his mother, with other circumstances tending to establish *monomania*, after hearing the testimony of eminent medical men on the subject, the prisoner was acquitted on the ground of insanity.

The prisoner was indicted for robbery, alleged to have been committed upon the 18th of August, 1849, and was tried at the Oyer and Terminer for Kings county, on the 10th of October following.

H. B. Duryea, (District Attorney,) for the people.

J. Dikeman and A. J. Spooner, for the prisoner.

Sarah Watson testified that about eight o'clock in the morning of the 18th of August, she was walking along Pearl street,

The People v. Sprague.

in the city of Brooklyn, and hearing some person behind her, looked round and saw the prisoner, who immediately seized her, threw her down, and took a shoe from one of her feet, and ran away. She testified that at the time, she had a gold chain upon her person, but that it could not be seen by the prisoner. She also stated that there was a man near by, who was unknown to her, but who hallooed at the prisoner, and gave chase to him, but that the prisoner outran him and escaped. It was admitted by the prisoner's counsel, that the shoe of Miss Watson was found in the prisoner's overcoat pocket, about ten o'clock of the same day, at the printing office of the Long Island Star. It was proved that the prisoner was a printer by trade, and was then employed as a journeyman in the office of the Star; that he came to the office upon that morning at his usual time, hung up his overcoat and went to his work as he had done before. One of the proprietors of the Star, hearing of the circumstances of the outrage upon Miss Watson, and her description of its perpetrator, suspected the prisoner, and demanded of him the shoe he had taken from the foot of a young lady that morning. The prisoner replied, "It's in my overcoat pocket." The shoe was taken from the pocket of the prisoner's overcoat, and afterwards identified by Miss Watson as the one taken from her in the street. The prisoner made no attempt at concealment or explanation.

The counsel for the prisoner admitted that if the prisoner was sane, he was guilty of the crime for which he was on trial. The prisoner's counsel called the

Rev. Isaac N. Sprague, father of the prisoner, a highly respectable congregational minister, who testified that the prisoner's age was twenty-five years; that he had generally resided in the family of the witness, but had spent a year with a brother at Hartford, Connecticut, where he went about four years before; that since his return from Hartford the prisoner had lived with the witness; that the prisoner was married in the year 1847, and was with his wife living at the house of the witness at the time of the assault upon Miss Watson; that the prisoner had, at different times received wounds and bruises

The People v. Sprague.

upon the head; that when quite young he was struck with a hoe near the crown of the head, producing an open wound, which after some time closed and healed up; that when about twelve years old, the prisoner fell from a cherry tree, striking upon his head. That witness, with his family, moved to Hartford in 1837 or 1838, and soon after the prisoner fell from the balcony of a second story, and was brought home insensible; that no immediate effect seemed to be produced upon the prisoner's mind by this accident, but that soon after his conduct became strange. He testified that his (witness's) mother had been insane for eight years, and some part of the time in an insane hospital; that a brother of his mother became insane and hung himself; that two sisters of his mother were occasionally insane; that his grandmother, on his mother's side, was also insane. He stated that he and his wife had always known the mind of the prisoner to be not as strong as the minds of their other children; that after the fall from the balcony the prisoner was more carefully watched and kept in, and some painful indications were developed in the prisoner—as at times a remarkable prominence of the eye, and a dullness, which appeared to increase, and a physician was consulted. An effort was made to educate the prisoner for college, but found that could not be done. About this time a shoe of some female member of the family would be missing, and when found would frequently be wet and crumpled up; that a girl, named Almira Godfrey, who was living in witness's family at the time, was at first suspected, but at length one of her shoes was missing, and when found was also wet and crumpled like the others. The family then suspected Charley, (prisoner,) and soon found it was he who took away the shoes. When a shoe was missing, it would be found sometimes under his pillow, sometimes between the straw and feather bed, sometimes in his trunk, and sometimes in his pocket, generally with clothes wound round the shoe, as if to conceal it. That the prisoner, before his fall from the balcony, had been truthful, and of a frank and open demeanor, and willing to acknowledge the truth, though to his disadvantage. After it was found he took the shoes, whenever one was missed

The People v. Sprague.

and I spoke about it, he would hang his head and say he did not know, but the shoe would be found somewhere secreted. On some occasions, when a shoe had been missed, and found under his pillow, his mother would say to him, "Charley, another shoe gone;" to which he would reply, "I'm sure I didn't do it;" his mother would say, "I found it under your pillow;" then he would admit it. He seemed not to have a memory of the fact. I punished him for taking shoes, but I soon thought I could recognize the features of insanity in his conduct. Pains were taken to keep shoes out of his way, and they were put in drawers, and he would take them out of the drawers in the night. At times the prisoner had fullness of eyes, a vacancy of the eye was frequently apparent. We kept him in evenings, and away from exciting amusements. About the time of the affair for which prisoner is on trial, he complained a good deal of headache; that witness had sometimes sent Charles (the prisoner) to the country. He was once away for about two years. His practice of taking and secreting shoes has continued down to the present time, although it has intermitted. I went to board with prisoner last May. His wife would miss her shoes occasionally, and they would be found where the prisoner had secreted them.

On cross-examination, this witness said that he saw the wound from the hoe; that he did not see the wound caused by the prisoner's fall from the cherry tree, which took place in Vermont; that he saw the wound occasioned by the fall from the balcony: that all apprehension passed away in a day or two after the fall from the balcony, but soon after came the protruding and glassiness of the eye; that he was then between twelve and fourteen years old, and went to school; that his moral sense seemed to be somewhat blunted; that he was not as truthful as before.

There were also read in defence, the deposition of Thomas Sprague, of Michigan, (a brother of prisoner,) and of Mary E., his wife, and of Julia A. Hyde, a sister of prisoner's father, and of Oliver Hyde, her husband, of Rebecca Freeman and Maria King, all witnesses living out of the state. The depositions

The People v. Sprague.

of Thomas Sprague and wife were principally to the habit of the prisoner while living with them, to take shoes of ladies and secrete them. Some of the depositions spoke of the fact of the fall from the cherry tree in Vermont, and some of them proved the insanity of the relations of the prisoner, in corroboration of the statement of the prisoner's father.

Charles H. Nichols, M. D., testified that he was twenty-nine years of age; that from May, 1847, to March, 1849, he was at the State Insane Asylum at Utica, and in April, 1849, came to the asylum at Bloomingdale, of which he had had the charge since. That while he was at Utica there were about eight hundred patients in the asylum, and about one hundred and fifty at Bloomingdale. This witness testified that from the testimony in the case, he was clearly of the opinion that the prisoner was laboring under derangement of mind; that the act charged appeared to him to be an insane act; that it was not uncommon for monomaniacs to secrete, and to endeavor to escape; that cases of strict monomania were very rare, but do exist, and in such cases all conduct not affected by the peculiar delusion, may be perfectly rational. The cases of insane impulse are more frequent than those of monomania; acts done under insane impulse are more likely to be remembered than those done under the influence of monomania.

Theodore L. Mason, M. D., testified that insanity is the genus, monomania a species, and that the impulsive characteristic may be common to both general and partial insanity. He was of the opinion that the prisoner was partially insane, and that the act for which he was on trial, was done from an insane impulse.

The evidence being closed, the case was submitted under the charge of the court.

The Presiding Judge charged the jury, that there was no question made, that the prisoner had done the act alleged in the indictment, and that the only question for them to decide was whether the prisoner at the time of the act done, was a responsible moral agent. That if at the time he did the act the prisoner was of sound mind, and capable of judging between right

The People v. Sprague.

and wrong, then he was guilty of the crime charged upon him, but if he was of unsound mind, and acting under an impulse which at the time overthrew or obscured his knowledge, or capacity to judge of right and wrong, then he was not capable of committing a crime, and must be pronounced not guilty. That it seemed quite unnecessary to go into any consideration of the question of general insanity, as the whole defence had been put upon the ground that the prisoner was partially insane, and that the peculiarity of his insanity consisted in what appears to the sane mind an objectless desire to possess himself of the shoes of females, and to hide and spoil them. That insanity, as a defence, was an affirmative matter; and in order to be allowed, must be proved beyond all reasonable doubt. If they were satisfied beyond reasonable doubt that the prisoner did the act charged in the indictment under an insane impulse, being at the time incapable of knowing right from wrong, it would be their duty to return a verdict of not guilty; but if they were not satisfied of the prisoner's insanity, it would be their duty to find a verdict of guilty.

After a short absence, the jury returned with a verdict of *not guilty*

SUPREME COURT. Delaware General Term, July, 1852.
Mason, Crippen and Shankland, Justices.

THE PEOPLE *vs.* JOHN M. THURSTON.

Form of a writ of *certiorari* to remove a cause from the Oyer and Terminer to the Supreme Court, after verdict and before sentence, pursuant to 2 R. S. 736, § 27, and of the certificate on which the same may be allowed under § 23.

Form of an order for summoning additional jurors under 2 R. S. 417, § 41.

After pleading not guilty to an indictment for murder, and before the empanneling of a jury, an objection was made in behalf of the prisoner, that the caption of the indictment erroneously described Israel S. Hoyt, one of the justices who held the court at which the indictment was found, as "*one of the Justices of the Peace in and for the county of Tioga,*" and that by the constitution and laws of this state, a justice of the peace was a town and not a county officer, but the objection was overruled by the Oyer and Terminer.

Where a justice of the Supreme Court had made an order for summoning 24 additional jurors, and after the drawing of the first 36 jurors, and before the drawing of the additional 24 jurors, the old jury list had been destroyed, as required by law, and a new jury list had been substituted, and it happened that one of the 24 persons last drawn had been previously drawn as one of the 36 jurors, so that in fact only 23 additional jurors had been drawn, on challenge to the array for that cause, the challenge was overruled by the Oyer and Terminer.

On the trial of an indictment for murder, a witness called in behalf of the prisoner, testified on the cross-examination that the prisoner became attached to a lady while she was staying at the house of his father, and that she became pregnant at that time and during her stay there, it was held incompetent for the prosecution to prove further by the witness that the witness knew the prisoner was charged with the seduction, and that the witness heard of it within a few days after the young lady left; and where such evidence had been admitted at the Oyer and Terminer, a new trial was granted.

On a trial involving an inquiry as to the sanity of a prisoner, a medical witness can not be permitted to give his opinion on the case, or on the question of guilt, but only on the question of sanity. Per SHANKLAND, J.

Nor can a medical witness be permitted to give his opinion on the prisoner's sanity, where he has heard only part of the evidence on the subject, and his opinion has been formed on such part of the evidence. Per SHANKLAND, J.

A medical witness may give his opinion on a hypothetical statement of facts and it will be for the jury to judge whether the supposed facts so stated correspond with the facts as proved. (a) Per SHANKLAND, J.

(a) See *Lake v. The People*, (1 *Park. Cr. Rep.* 495,) since affirmed by the Court of Appeals.

The People v. Thurston.

Opinions of eminent medical witnesses upon the subject of insanity, with their statements of the symptoms and evidences of insanity, and of the causes which produce it.(a)

This cause was brought up to this court by a writ of *certiorari*, which was as follows:

The People of the State of New York:

[L. S.] *To the Court of Oyer and Terminer, in and for our county of Tioga,* GREETING:

We having been informed that John Metcalf Thurston, of said county, was lately in the said court tried and convicted of the crime of murder, upon an indictment thereinbefore found against the said John Metcalf Thurston, and that upon the said trial of the said indictment, exceptions to certain decisions of said court were made by the said John Metcalf Thurston, and a bill of said exceptions has been settled, signed and sealed by the persons composing said court, and filed with the clerk of the said court, and we being willing, for certain reasons, that the said indictment and bill of exceptions and other proceedings thereon, remaining in the said court, should be certified by the said court to (and removed into) our Supreme Court, do hereby command you, that you do certify and return without delay, said indictment and bill of exceptions and other proceedings thereon into our said Supreme Court, so that the said Supreme Court may act thereon, as of right and according to law ought to be done.

Witness, Levinus Monson, Esq., one of the justices of the Supreme Court, at the Court House, in the village of Owego,

(a) The defence in this case was insanity. It has been thought necessary to a proper understanding of the questions involved, to report the testimony at length, that all the facts may appear upon which the medical opinions were based. The case is one of interest to both the legal and medical professions, and the evidence is of great value as a contribution to the science of medical jurisprudence. Among the distinguished physicians examined, whose testimony is given at length upon the subject of insanity, and who spoke of it in its various phases and varieties, were Doctor Nathan D. Benedict, physician and superintendent of the New York State Lunatic Asylum at Utica, Doctor John S. Butler, physician and superintendent of the Connecticut Retreat for the Insane at Hartford, and Doctor Charles H. Nichols, physician to the Bloomingdale Asylum for the Insane.

The People v. Thurston.

and county of Tioga, on this twentieth day of October, in the year of our Lord one thousand eight hundred and fifty-one.

M. STEVENS, *Clerk.*

A. MUNGER, *District Attorney of the county of Tioga.*

Endorsed. The within writ of *certiorari* allowed. LEVINUS MONSON, Justice Supreme Court. Filed Dec. 12th, 1851. To which was annexed a return as follows:

m

To the Supreme Court of the State of New York:

The return to this writ appears by the schedule thereto attached, containing a transcript of the indictment, bill of exceptions, certificate staying judgment, and other proceedings thereon.

The answer of the judges of the court of Oyer and Terminer, of the county of Tioga. January 2, 1852.

[L. s.]

MOSES STEVENS, *Clerk*
of said court of Oyer and Terminer.

The first count of the indictment was as follows:

At a court of Oyer and Terminer, held at the Court House in the village of Owego, in and for the county of Tioga, on the second Monday of April, in the year of our Lord one thousand eight hundred and fifty-one.

Present—Hon. William H. Shankland, a justice of the Supreme Court, presiding justice of said court, and Charles P. Avery, Esq., county judge of said county, and Israel S. Hoyt, a justice of the peace in and for said county, designated as members of the Court of Sessions in and for said county. The jurors of the people of the State of New York, in and for the body of the county of Tioga, to wit: Horace Giles, foreman; William Slosson, Chester Dawson, Barlow Sandford, Charles Farnham, James Wheat, Louis P. Legg, George Truman, Franklin Smith, Jeremiah McMaster, Charles Ward, Ozias J. Slosson, Ambrose Townsend, James T. Schoonover, Charles Beers, Elias Richardson, Charles Bingham, John J. Sackett, Abel Dubois and Daily Dunham, good and lawful men of the said county of Tioga, being then and there duly sworn and charged to inquire

The People v. Thurston.

for the people of the State of New York, in and for the body of the county of Tioga, do upon their said oath present in manner and form following, that is to say:

Tioga County, ss.

The jurors of the people of the State of New York, in and for the body of the county of Tioga, upon their oath aforesaid, present—That John Metcalf Thurston, late of the town of Owego, in the county of Tioga, aforesaid, cabinet maker, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the seventh day of February, in the year of our Lord one thousand eight hundred and fifty-one, at the town of Owego in the county of Tioga, aforesaid, with force and arms in and upon one Anson Garrison, in the peace of God and the people of the State of New York, then and there being, feloniously, willfully and of his malice aforethought, did make an assault, and that he, the said John Metcalf Thurston, with a certain axe of the value of one dollar, which he, the said John Metcalf Thurston, in both of his hands then and there had or held, in and upon the head of him, the said Anson did strike, giving to the said Anson Garrison then and there with the axe aforesaid, in and upon the head of him, the said Anson Garrison, one mortal wound of the breadth of seven inches and of the depth of three inches, of which mortal wound he, the said Anson Garrison, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Metcalf Thurston, him the said Anson Garrison, in the manner and by the means aforesaid, then and there, feloniously, willfully, and of his malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity.

There were other counts in the indictment. The defendant pleaded not guilty. It appeared by the return that an order for summoning an additional number of jurors had been made, pursuant to statute, as follows:

The People v. Thurston.

State of New York, Tioga Oyer and Terminer:

It being my opinion that more than thirty-six petit jurors will be required at the next term of the court of Oyer and Terminer, appointed to be held at the Court House in Owego, in and for the county of Tioga, on the second Monday of October next, I do therefore order that twenty-four additional petit jurors be drawn, and summoned according to law, to attend the said term of the said court. Dated, August 6th, 1851.

W. H. SHANKLAND,

One of the Justices of the Supreme Court.

Which said order was served on and filed with the clerk of the county of Tioga, more than twenty days previous to the day appointed for the commencement of the said court of Oyer and Terminer.

The indictment was brought to trial on the second Monday of October, 1851, at the Tioga Oyer and Terminer, before Mr. Justice Monson, Avery, county judge, and Waldo and Hoyt, justices of the Sessions. The counsel for the said John M. Thurston raised an objection as follows, to wit: That the indictment recites that it was found at a court held by William H. Shankland, a justice of the Supreme Court, Charles P. Avery, county judge for the county of Tioga, and Israel S. Hoyt, *one of the justices of the peace in and for the county of Tioga, &c.* The objection is that there is no such officer as a justice of the peace in and for the county of Tioga, by the constitution or laws of this state, a justice of the peace being a town officer; and that the indictment thereby shows that the court at which the indictment was found had no jurisdiction. The court overruled the objection, to which decision the counsel for the prisoner then and thereupon excepted.

The counsel for the prisoner then interposed the following challenge:

The said John M. Thurston challenges the array of the panel, because he says that it being the opinion of William H. Shankland, one of the justices of the Supreme Court of the State of New York, that more than thirty-six petit jurors would be re-

The People v. Thurston.

quired at the present term of the court of Oyer and Terminer, held at the Court House in Owego, in and for the county of Tioga, he, the said justice, did on the 6th day of August, 1851, by an order under his hand, bearing date on that day, order and direct that twenty-four additional petit jurors be drawn and summoned according to law, to attend the said term of the said court of Oyer and Terminer; yet that twenty-four additional petit jurors were not drawn or summoned according to law, to attend the said term, but that Marshall Anderson, one of the jurors drawn under said order had before been drawn as one of the thirty-six jurors required by law, to be drawn to serve as jurors at said court, and was not an additional petit juror to said thirty-six jurors, but one of said thirty-six jurors, and but twenty-three additional jurors were drawn pursuant to said order of said justice. And this he is ready to verify; wherefore he prays judgment, that the panel may be quashed, &c.

To which the public prosecutor interposed the following answer:

Tioga Oyer and Terminer.

The People <i>vs.</i> John M. Thurston.	}	And hereupon the people aforesaid, by Alan- son Munger, District Attorney of the county of Tioga aforesaid, answers the said challenge so made by the said John M. Thurston, and says, that after the drawing of the said thirty-six jurors, before mentioned, for the said court of Oyer and Terminer, in due and legal manner, the said order of the said Wm. H. Shankland, one of the justices of the Supreme Court, or- dering and directing the drawing of twenty-four additional petit jurors to attend the said term of said court of Oyer and Terminer, was obtained, served and filed with the clerk of said county of Tioga; that after the time of drawing the said thirty-six jurors, and before the time for the drawing of the said twenty-four addi- tional jurors, under and in pursuance of said order, a new return of jurors had been made by the proper town officers of the several towns in the said county of Tioga, as provided by statute, to the said clerk; that thereupon and before the time for drawing the said twenty-four additional jurors, the said county clerk had destroyed
---	---	---

The People v. Thurston.

(as he was required by law to do) the list of jurors or ballots from which the jurors to attend the court of Oyer and Terminer of said county had theretofore been drawn, and that the said twenty-four additional jurors, so required by said order, were drawn in manner and form directed by statute in such case made and provided, by the said clerk from and out of said new lists of jurors, so newly furnished to him, the said clerk as aforesaid, and that the full number of twenty-four additional jurors were drawn out of the proper lists or ballots, in pursuance of said order and in the manner provided by law, and the twenty-four jurors thus drawn, as last aforesaid, were duly summoned, which the people are ready to verify; wherefore they pray judgment that the said panel may not be quashed, &c.

A. MUNGER, *District Attorney.*

The prisoner's counsel replied as follows:

And the said John M. Thurston, protesting that the said answer and the matters therein contained, are not a sufficient answer in law to said challenge; replies to said answer that twenty-four additional jurors were not drawn, as required by said order, or in manner and form directed by the statute in such case made and provided, by the said clerk, and that the full number of twenty-four additional jurors were not drawn from and out of the proper lists or ballots, in pursuance of said order, or in the manner provided by law, but that one of the jurors of the twenty-four drawn, in pursuance of said order, was also one of the thirty-six petit jurors previously drawn for said term of said court of Oyer and Terminer, and was not an additional juror thereto, and that but twenty-three additional jurors were in fact drawn in pursuance of said order. And this he is ready to verify; wherefore, as before, he prays judgment that the panel may be quashed, &c.

The counsel for the defence called *Marshall Anderson*, the juror, who being duly sworn, testified: I reside in Candor; know no other man of that name in that town; I have lived there forty years; there might be another man of same name reside there for a short time, and I not know it.

The People v. Thurston.

Cornelius Hover was then called by counsel for defendant, and sworn and testified: I summoned a part of the jury, and summoned only one Marshall Anderson; I reside in Candor; should think no other could reside there without my knowing it.

Moses Stevens, clerk of Tioga county, being called by counsel for the people, testified: The panel from which the first thirty-six jurors for this court were drawn, was made three years ago; afterwards that list was destroyed and a new one made before the twenty-four additional jurors were drawn, and in drawing them Marshall Anderson, of Candor, who was one of the thirty-six, was again drawn.

The court overruled the challenge, and the counsel for the defendant then and there excepted to the decision.

The drawing of the jury was then commenced.

The jury being impaneled and sworn, the cause was then opened to the jury on the part of the people, and the district attorney called as a witness,

Phebe Thurston, who was duly sworn and testified as follows: I reside in Temple street in this village; have resided here about one year; my husband's name is James Thurston. We were married a year ago last September; my husband is a brother of defendant; have known defendant and his family since my marriage; knew some members of the family previously. Defendant is a married man; was married in November last; he commenced housekeeping in January or first of February last, shortly before the unfortunate occurrence; he resided on Ithaca street; I was at his house the evening of the occurrence; went there between six and seven. There were present at the time, defendant's mother, Mrs. Garrison and child, and defendant and wife. The child is about six years old, name Elizabeth; they called it Libby. My husband went with me to defendant's and left in a few moments; Mrs. Garrison and child, defendant and wife, were present when I arrived; defendant's mother came soon after I went in; Garrison arrived about eight p. m., or not far from that; I had been there a considerable time when he came; they were taking tea when I went in. Defendant

The People v. Thurston.

came into the room immediately after Garrison entered; he had left the room but a few minutes before he and Garrison entered. Garrison took a chair the first thing after he entered the room, and then took his child; can't tell whether any one handed him the chair; am not decided on that; he moved the chair before he sat down, and then reaching out his hand to the child, drew her toward him; thought he put her on his lap; but am not sure of it; he sat on the east side of the room, a few feet from the back door, and between the stove and door, his feet near one corner of the stove, his back towards the door and his feet towards the stove. Defendant went out at the back door into the shed while Garrison was seating himself; he did not stop in the room. Garrison spoke to the child as he entered the room, and said, "Libby Garrison, why do you cry," or, "what is the matter;" don't remember as he called her to him. The next I saw after defendant went out at the door was the blow; it hit on Garrison's head; the blow seemed to strike near the top of the head; did not see distinct enough to know with what it was given; heard the blow; saw but one blow given; only one; I think the child was sitting on Garrison's lap when I saw the blow; I saw nothing after the blow; left the house immediately; the child was screaming; I remember nothing after the blow; it was perhaps three or four minutes from the time defendant went out until I saw the blow; nothing said while he was out except that Garrison spoke to his child; no one changed position; defendant's wife was in the bedroom; the door was open between the kitchen and bedroom; Charles T. Bell lived in the other part of the house. Mrs. Garrison sat on the south side of the room, east side of the stove; between the stove and back window; defendant's mother sat upon the opposite side of the stove by my side; I sat on the south side of the building and on the west side of the stove, nearly facing Mrs. Garrison; the stove was a cooking stove; no one sat directly in front of the stove. Mrs. Garrison requested defendant to go and see her husband and see what he had decided to do about taking the child; they had expected him up there that

The People v. Thurston.

evening, but had about given up his coming; I understood that Garrison was coming up by the conversation between defendant and his sister; he did not come up as soon as expected.

Cross-examined.—The conversation about this was commenced soon after I went in; there was something said about his coming up; defendant advised his sister to let Garrison have the child; told her not to get excited; said there was no use of it; had better keep calm. It was said Garrison would not be happy with the child, and perhaps would return it. Something was said about putting the child to bed; defendant said that they had better not until they knew whether Garrison was coming; said if he came he would take the child even if it was in bed; he advised her to rest before she decided about it; before he gave this last advice, it was said it was so late he would not come; it was at her request that defendant went after him. In connection with the remark that Garrison would not come, defendant said Mrs. Garrison had better take a night's rest; she said she could not rest until she knew what he was going to do. After she requested him to go for Garrison, defendant went out; was gone some few minutes, can't tell how many. Defendant seemed calm and composed during the evening before the catastrophe; when they came in the room, I think Garrison came in ahead of the defendant; when defendant returned he told Mrs. Garrison that her husband was at the door and wanted the child; she either said she could not take the child to him, or, to force it from her; if he wanted the child he must come in; defendant returned to the door and they came in together; no conversation between Garrison and defendant after they came in; can't tell whether defendant pointed Garrison to a chair, or whether he took one without being shown. Defendant's wife had not been sitting down before she took her seat in the bedroom; she had brought a basket of apples from the wood-house a moment before; defendant had been sitting in the southeast corner before he went after Garrison; I think I changed my seat after defendant went out and before they came in; I had been sitting in front of the stove on the north side of the room. Garrison removed the chair some distance before he sat

The People v. Thurston.

down; it was placed in front of the stove; it was the one I had been sitting in; he moved it towards his wife and child, and to where he was sitting when he was killed; don't know what defendant was doing when he was out at the back door.

Direct resumed.—I think none of us rose out of our seats after they came in until the blow was given; Garrison and his wife sat a short distance apart. I think there was something said before Garrison came, about defendant's having conversed with him that day; he said to his sister that she must be calm; that he had been calm all day, and she ought to be.

Andrew J. Madan, sworn: I resided in this village until July last; have resided in Owego for twenty-five years; knew Anson Garrison, and know defendant; saw both Garrison and defendant on the night of this occurrence; met Garrison on the sidewalk in front of defendant's house; I was walking towards the depot, he was going the other way; saw defendant just as I passed Garrison; he came out of the door of his house upon the stoop; he came on the stoop and saw Garrison, I suppose, and said, "I am glad you have come, I was just going over." Garrison went through the gate to the house; did not hear any thing said about his going in; did not see defendant beyond the stoop. This was a little past seven; I went to the depot, and in a short time afterwards, fifteen or twenty minutes, I heard of the killing.

Jacob N. Smith, sworn: I reside in Addison, Steuben county; I resided in Owego from the third of February, 1850, until about three weeks ago; knew Garrison and defendant; saw them on the night this affair happened at defendant's house. I heard the alarm that some one was murdered; I was opposite the Tioga House, near the Diamond store; I ran to the house, went to the front door; saw Mrs. Garrison standing opposite the door that leads to the hall, just inside of the front room; she had the child in her arms; went into the kitchen, saw defendant and his mother and another gentleman I did not know; saw defendant standing in the doorway leading from kitchen to bedroom; saw Garrison; he was sitting in a chair nearly in front of the stove, feet close to the stove, back towards the north,

The People v. Thurston.

head inclining towards the left shoulder, a little back; a candle was in the room; the gentleman asked him either how he came to do it, or what he did it for; think a stranger had his hand on defendant's arm; defendant said he could not help it; he abused his sister last night; said nothing else as I heard. I noticed Garrison's head; I saw the cut on the right side of his face; when I first went in, old Mrs. Thurston was on the left of Garrison; passed around behind him; while I was there a lady handed me an axe from the back door and said, "This is the axe he did it with." The axe was bloody and had hair on it; bloody on the side from the eye toward the edge.

Cross-examined.—I have not since learned the name of the stranger, but suppose it might have been Garland from what I have heard on the stand. Defendant was standing still in the act of buttoning up his overcoat when I went in; he passed out into the front room first; think the stranger did not pretend to hold him in custody.

Edward J. Johnson, sworn: I reside in the village, and have for eight years; knew Garrison and defendant; some acquainted with their families. At the time of this affair I resided nearly opposite defendant's; I was passing into the street; heard an unusual noise at defendant's house; listened and heard loud cries from a female; I turned and gave the alarm; passed across to Dearborn's and spoke to a man to go to Thurston's; told him some accident had happened at defendant's; saw some other men near by and told them the same, and ran for the house; I met defendant at the door in the entry; the first one I saw was Mrs. Garrison, she was crying and making exclamations that her brother had done an awful deed, that she could never forgive him; defendant then came to the door where I met him. Mr. Dearborn was by my side as we entered the front door; he asked defendant what was the matter; there was some answer given, can not give the precise words. Defendant rested his hand upon my shoulder and requested me to call in a justice of the peace, or some officer; that he wished to give himself up; he looked toward Dearborn and said, "he wished he would call in some of the neighbors." When he addressed himself to

The People v. Thurston.

Dearborn, he spoke kindly. I went for an officer; called Willard, the deputy sheriff; did not go into the kitchen until I returned; I then saw Garrison sitting in the chair.

Cross-examined.—When he spoke about having the neighbors called in, he spoke kindly, not excited, but exhausted; looked pale; saw his eyes, they were wild.

Charles H. Hullaran, sworn: I reside near Hollenback's brick yard; lived in Owego over two years; did not know Garrison previous to the affair; I had seen defendant a few nights before that; I was in Ogden's, the gunsmith's, across the street from defendant's when I heard the alarm; made haste to cross the road, and went in the kitchen; saw Garrison and others; I did not know defendant; he was doing nothing then; a moment after saw him take hold of Garrison's head and keep it right; still some women in the room; did not know who they were; they were betwixt old and young. I asked defendant who killed the man; he said it was himself; I remained eight or ten minutes; a number went in with me, and a number came in afterwards. Defendant held Garrison's head with one hand; one wound was all I noticed; when defendant said "he did it," I said "you have committed a bad deed;" he replied "he guessed not."

Cross-examined.—The head inclined over; he put his hand on the under side of the head and held it up.

Isaac B. Ogden, sworn: I reside in this village, and have for twenty-five years; I knew Garrison and defendant; I was in the street crossing from the Court House to Slosson's store, when I first heard of the affair; went immediately to defendant's house; saw defendant before I fairly entered the house; can't tell whether he was on the stoop or steps; I asked him what was the matter; he replied he supposed Garrison was dead; I asked how it happened; he said he struck him with an axe; said he wished me to go in and see to him and attend to him; I am a cabinet maker, also an undertaker; do not keep ready made coffins; make them to order; saw an axe which a lady handed through the back door of the kitchen; noticed its appearance; bloody, and hair upon the axe; did not notice how far the blood extended; did not notice who handed me the axe.

The People v. Thurston.

Cross-examined.—Defendant appeared calm and cool; after he said he did the act, I noticed he appeared paler than usual.

Samuel T. Garland, sworn for people: I reside in this village, about half way between Court House and the depot, on Ithaca street; I was sitting in my bar-room when I heard the alarm; I went directly to defendant's, went rather quickly; a man by the name of Woolley gave the alarm to me; don't know where he is; is not about town to my knowledge; I first saw Mrs. Garrison; she stood in the front room with a small child in her arms; I passed into the kitchen; saw Garrison sitting in the chair, and defendant's mother was holding his head, with her hands under his head; noticed no moving of Garrison except a little muscular action of the face; defendant was in the kitchen; I said, "Met, what have you been doing?" he passed by and said he could not help it; that was all he said; he passed through the square room to the door; that was the last I saw of him; I saw the gash on Garrison's face; saw nothing else.

Cross-examined.—When I first went in, there was no one present except the family, as I saw; saw no one but what I knew; others came before I went away; there was quite a rush; as defendant passed off to the front of the house, looked white, and wild out of his eyes; he looked very pale, trembled; saw him put his hat on his head; his hand trembled some.

John Bell, sworn: My father's name is Charles Bell; I am twelve years old; my father lived in same house with defendant, last winter; he lived in south part; defendant did not own any axe last winter, as I know of; father owned one; he kept it for splitting wood: I used the axe to split kindling wood; used to split it at night, after school, every night; split it out by our woodshed; shed in the east and back side of the house; used to leave the axe in the corner of the shed when done using it; defendant used the axe to chop his wood: his wood was lying out at the back end of the little shed; he used to lay the axe sometimes by the stoop at our back door, and on the north side, and sometimes he would take it back to the shed, where we kept it; I don't know as I should know the axe; have not seen

The People v. Thurston.

it since this affair; (axe here presented to witness,) can't tell whether it is our axe or not.

Cross-examined.—Defendant split his own wood; had not been in the habit of splitting his own wood a great while; don't know what time in the evening he split his wood; don't know whether he always carried it back or not; defendant had not been there but a few days; it was carried back to the shed sometimes; can't tell how many times it was left in the stoop.

Thomas I. Chatfield, sworn: I reside in this village; (axe presented to witness.) I have had possession of the axe since the night of the murder; got it at defendant's house; it was covered with blood; fresh blood, and hair upon the bit of the axe; the hair and dry blood is still on the axe; it has since been at my store opposite the Tioga House; I took it at the request of the district attorney; it has since been wrapped in the paper in which it was wrapped when brought into court. Garrison was sitting in the chair when I was there.

James Haviland, sworn: I live in Canawana; last winter worked at Camp's foundry; knew Garrison, he worked in the same room; I then knew defendant; I saw him on the day Garrison died; saw him in the forenoon; was in the shop with Garrison; saw him first in the forenoon, quite early in the day. I should think he remained in the shop about two hours; he and Garrison were talking; defendant was there again that day, about four P. M.; remained a few minutes; when I first went into the shop defendant and Garrison were sitting by the stove close together, conversing; heard nothing that was said; they were talking very low; I heard defendant invite Garrison up to the house that evening; Garrison said he would go after he went home and got his supper; he was then washing up; this was in the afternoon.

Cross-examined.—I know that Garrison sent for defendant to come down and see him; he sent me at noon; I delivered my errand; I told Garrison I was not going to work in the afternoon; it was then he sent me up to have defendant come; Garrison wanted him to come right down. While they were conversing in the morning they conversed in rather a low tone;

The People v. Thurston.

heard no altercation between them in the afternoon; their conversation was friendly. I went away in the afternoon, when I returned defendant was there.

Isaac Spaulding, sworn: I live in Ridgberry, Pa.; lived in Owego last winter; west side of the park; I knew the night of Garrison's death; was in Diamond store, in the auction room opposite defendant's, when I heard the alarm. We went across the street in front of defendant's gate, and halted there; we then went into the front entrance, saw no one; then went into the front square room, then into the alley; at the end of the alley I met Mrs. Garrison; some words passed and I stepped into the kitchen; I then saw defendant, Wm. Livingston and Chauncey Woolley and two or three ladies; defendant had a candle in his hand; came towards the alley with the candle in his hand; he spoke and asked me if I would go after a physician; I said "there is no use for he is dead." He said, "I want you to go after a physician, for I suppose he is dead, I meant to do it." Nothing else was said; I started after a physician on Front street, for Nye; met him in front of the Tioga House; did not return; was within two feet of Garrison when in the kitchen; saw the gash in his head; saw nothing on the face at the time, it was so covered with blood. Woolley took hold of the head when he first went in; stood behind him.

Cross-examined.—William Livingston, Chauncey Woolley and two or three ladies I supposed to be of the family, were present when I first went in; no others present; can't tell who came next; I remained until others came in. Woolley went then with me; I saw Johnson come in as I was leaving the house; did not see Garland in the house; saw him at the door; saw a large company at the door; Livingston and Woolley did not come away with me; I reside thirty-six miles from here; left here the 13th of last month; defendant asked me if I would go for a physician; said he had killed him and meant to do it; can't say as to his paleness; did not notice that he was tremulous; said he was dead and wanted me to get a physician.

Stephen A. Phelps, sworn: I reside half a mile from this village; was in the village on the evening of the death of

The People v. Thurston.

Garrison; was on the opposite side of the street at the auction; some persons came in to the auction and said there was a murder committed over at defendant's; went immediately to defendant's; went into the entry; from there to the first room of the house; from there into the kitchen; some two or three in the room where Garrison was, and perhaps as many more passed in with me; saw Mrs. Garrison at the gate; did not see defendant until I went back from the kitchen; then saw defendant in front entry; I asked him if he knew or could tell me who murdered Garrison; defendant said yes, "I am the man that did it, I killed him." Nothing else said.

Cross-examined.—The females had just left the house; I gave my attention to his appearance; he seemed melancholy or sad; did not see that he was excited; did not notice whether he was pale; did not notice his eyes; stood in a kind of studying posture; was in the entry.

Sarah Hill, sworn for people: Live on Ithaca street; next house to where defendant lived last winter; I heard of Garrison's death the night on which he was killed; I heard an outcry at defendant's; I was then in the yard back of our house, some twenty-feet, looking towards defendant's house; before I heard the noise, I saw him come to the door, open the door and come out into the shed back of his house; saw him stoop down; saw him go back into the house; the next I heard was a scream; it was instantly as he went in; it was a short time from the time he came out until I heard the scream; it was quite quick; I did not see him go out of the back shed; there were two open places in the side of the shed; one was a stove pipe hole, and I don't know what the other was for; the other was square. The stove pipe hole was west, and nearest our house, and was the highest from the ground. I stood on higher ground than the building; could not see into defendant's kitchen when the door was open; could only see the light.

Cross-examined.—It was the most light by moonlight; I stood by the back building in our yard.

Frederick Nye, sworn: I reside in this village; am a physi-
VOL. II. 9

The People v. Thurston.

cian; know Garrison and defendant; was at defendant's house on the evening of the death of Garrison; examined his head; found one wound in the top of the head, or a little on the left side, and one in the face; the one in the left side of the head was an open wound five or six inches in length, and four inches in depth; opened some two inches; spread open; the other wound was upon the right of the head; the top of the wound commenced where the skin was broken, and lower jaw was fractured, though rather longer than the wound in the top of the head; it severed the jaw bone; done with a sharp instrument; the tendency of the wound was downwards and forwards; the first wound would have caused instant death. Garrison was sitting in the chair in an upright position when we examined him.

Robbins D. Willard, sworn: I reside in this village; am the deputy sheriff and jailer; have held the office two years next January; was in the Court House when I heard the alarm the night of the catastrophe; it was between seven and eight; Edward Johnson came and gave the alarm; I then went to defendant's house; saw Phelps first; I saw defendant; I was passing through the gate; Phelps gave me a jog and said, "there stands the murderer." I asked who, and he said, Thurston. Defendant was standing in the front entry, leaning against the door; I went on to the stoop, stepped by the side of defendant and spoke to him; don't remember what I said; he stood and looked me in the face and said, "It is Willard, is it?" he said he was ready to give himself up; think he said he had sent for me. When we got out into the yard, I asked defendant what was done; he said he had killed Garrison; he said, "I could not bear to hear the child scream." He had carried his left hand by his side till then; he swung it out and I noticed it was closed; asked him what he had in it; he said, nothing, that he held Garrison's head after he struck him with the axe, and his hand was bloody; I did notice it then. Just at that time we met Prentice Ransom; he wanted to know what was the matter; we were walking towards the Court House; I told Ransom that defendant had killed Garrison; he

The People v. Thurston.

wanted me to let defendant go back with him, said he would be responsible for him; said, "can't you go back too?" that was to me. I said I thought we had better not go back; defendant told Ransom to go and see that every thing was provided for Garrison that was necessary, and after he had got through there to come over to the jail; we then came this way and Ransom went the other way. Think defendant said, "I did not think this would happen when I was at the furnace to-day to see Garrison;" said he had been down there to see if Garrison would not consent to let the sister keep the child, but he would not consent to do it; that he found that Garrison had better rights to the child than she had, and that the arrangement was made for him to come after the child that evening. Mrs. Garrison had concluded to give the child up without making any fuss about it, or feeling bad; when the child screamed, he came in from the door and struck him. He wished me to take him to a room where he could wash; I took him to the kitchen and he washed himself. Odell Gregory came; we were the only persons in the room; I then noticed his hand, it was bloody. After he got through, Gregory went out and I called in Eldridge; I went to arrange the cell and left defendant in care of Eldridge. Gregory asked him, "Why, Met, how did you come to do this crime?" As I understood it, the answer was, "that it was an old matter, and if he undertook to give a description it might leave bad impressions." I soon after put him in a cell alone. After the excitement was over and the people had gone away, his sister Nancy came to see him; she went to the cell and spoke to him; he spoke about having the Daily Tribune sent to him, and some books to read; it was not a request made to me. There was something said about the influence it would have upon his sister, Mrs. G., but the sentence was disconnected, and I can not remember.

Cross-examined.—I think Ransom asked him how he came to do it, and his answer was, "I could not help it."

The prosecution here rested, and the court adjourned to 8½ o'clock on Wednesday morning.

On the assembling of the court, the counsel for the prisoner

The People v. Thurston.

opened the defence and read from commissions duly executed, and made other proof of insanity in the family of the prisoner, to a greater or less degree, in the following relatives, to wit: Eunice Thurston, grandmother on father's side; Levi Thurston, uncle on father's side; one aunt not named; Esther Darling, grandmother on mother's side; Cornelius Metcalf, grand uncle on mother's side; Elias Fisher, great grand uncle on mother's side; Silas Metcalf, and Deborah Bennet, mother's cousins; Eunice Hudson, and Esther Knight, grand aunts on mother's side; Elizabeth Darling and Mary Darling, cousins. The counsel for the prisoner then called as a witness,

William S. Weston, who being duly sworn, testified as follows: I reside in Wisconsin; I knew the defendant, Thurston. have known him about nine years; worked with him nine years ago this last September; worked with him eleven months; boarded and slept with him a part of the time; I think about two months; he was in the habit of a certain vicious practice, known as masturbation; couldn't say how frequently; knew of it several times; have no recollection of his telling me how often he did it; the practice extended through the whole of two months, frequently; don't know of his practicing it when I did not sleep with him.

Cross-examined.—I have not slept with him in the last nine years; my attention was recalled to this subject within the last two weeks; had not thought much about it before for a number of years; I came from Wisconsin on purpose to attend this trial; was written to and replied; I have no recollection how many times he indulged in the practice, nor how many times in a week; I think as often as every week; don't remember certainly how often; I spoke to him about it once or twice; he was in the same bed with me; I am the oldest; don't know how much older; I am thirty-six; he was engaged in cabinet work; I was journeyman for him; he worked, himself, though not as steady as his hands; he had one besides myself part of the time; he had no more than two at any one time. I never mentioned this subject to any body else; Mr. James Thurston wrote to me to come down.

The People v. Thurston.

James Fisher, sworn: I reside in Owego; know Thurston, the defendant; have worked for him about a year; commenced two years ago this fall; I slept with him from four to six months; knew about his being addicted to masturbation; when I first slept with him I should think as often as once a day; as often as once in twenty-four hours; I spoke to him about it; told him he would ruin himself if he kept on in that practice; he didn't practice it so much after that; I left off working for him about a week before his arrest. He appeared to be a very passionate man, and downhearted, if things didn't go to suit him; when they did go to suit him he was cheerful and as clever a man as I ever had any thing to do with; when in good humor he was full of jokes and wide awake; he treated me kindly; he had spells of low spirits, sometimes as often as two or three weeks, at other times six weeks or two months, and then he would have a blowing up of his hands, or something of that kind, perhaps discharge one. Sometimes these fits would not last more than a day, sometimes three or four days or a week; sometimes he worked some during these turns, and generally managed his business; didn't work much in his shop; was around doing business; we boys in the shop used to call these turns "lovesick scrapes," or "bulling scrapes," sometimes we called them something else. I could tell when they were coming on; don't know as he knew when they were coming on; he didn't say any thing on the subject; I never noticed his wandering about; have known of his retiring to bed in the day time, positive of only twice; once a year ago this fall, and once before that; he said he was unwell and had the headache. I know nothing as to his costiveness; his habits of eating were irregular; was particular how a thing was cooked; I have not known him to go without eating over two meals; these irregularities were quite frequent; sometimes he would eat very little, not so much as a man ought to; I have heard him speak of having water poured on his head; I remember the matter between him and a journeyman concerning some rocking chairs. He came into the shop and commenced crying, saying he expected to have forty or fifty dollars' worth of chairs done, but

The People v. Thurston.

now they were all spoilt; after that he said the reason he cried was because the journeyman spoke cross to him; I heard him say nothing about the journeyman loving him.

Cross-examined.—My age is twenty-one; I boarded at his mother's; Thurston also boarded there; I slept with him nearly all the time I boarded there, in the same bed with him; my attention was called to this subject since that period, some four or six weeks ago by James Thurston; I can not describe his turns of depression in any other way than that he had his fits; his conduct was rather sulky, his disposition angry; he talked loud in a scolding way, and pouted; he discharged me because he thought I charged him too much.

Jane Beers, sworn: I reside in this village; my husband's name is William P. Beers; I and my husband boarded four months with defendant's mother; we commenced the first of March, 1850; defendant was very irregular in eating; at times he would go without eating two or three meals; when he did eat he ate very hearty; at times he was very gloomy and very much cast down; these turns would last him sometimes a week, sometimes a fortnight, and sometimes longer; these spells came upon him perhaps once in six weeks, and perhaps once in four weeks, can't say exactly; at times when he had these turns he was very cross in the house; complained of a headache; would not talk much; would stand around and do nothing; have seen him stand an hour at a time and perhaps longer; would stand in his shop door and by the fence, near the shop; don't recollect that he spoke while standing; did not have company; he spent some time in the house during the spells; he lay down sometimes on the lounge in the day time with his hands up to his face; lay there perhaps an hour with his face down; complained of headache.

Cross-examined.—My husband's business is a cabinet maker; he worked for defendant when we boarded at his mother's; commenced work for defendant the third week in February and continued for about three months; during this time we boarded at defendant's mother's; and one month after husband ceased working for defendant; when defendant went without his meals

The People v. Thurston.

he complained of a headache; never knew him to go without his meals except he complained of the headache; don't know how long after we left that he was married; don't know that he was visiting a young lady at the time; did not know defendant's wife before her marriage; have seen her, but not acquainted with her; she lived in defendant's house where defendant afterwards lived; she lived with her sister; her sister's name was Mrs. Willey; defendant's mother lived a few steps from where his wife lived with her sister, on the same side of the street, and where defendant's shop was; I never conversed with defendant about his visiting the lady he afterwards married; don't know anything about it except hearsay; have seen him go in; don't know how long he tarried; I have set at my window an hour and perhaps two hours at a time, tending baby, one at a time; my own; I mentioned the circumstance of seeing defendant stand so to my husband about the time; the habits of defendant were first spoken of to me by my husband; can't tell when.

William P. Beers, sworn, says: I am the husband of the lady who has just left the stand; I worked for defendant and boarded with his mother; worked for him about three months; boarded at his mother's during that time; his spirits at times were low; they were sometimes longer and sometimes shorter; sometimes a week and sometimes not as long; he did not much of anything during these times; he was low spirited and did not attend to his usual business; don't know as they were regular; there was remarks made about their regularity in the shop; he very often complained of headache, and would then neglect his business generally; spent his time sometimes in the shop and sometimes in the house; used to lay down in the shop on the bench; this was during his low depression; he didn't know much about his business, or do much about it at those times; I don't know of any cause which produced the turns; nothing in his business to produce them; was somewhat acquainted with the state of his business; could not get him to speak of his business so as to get any information; in these times his habits of eating were very irregular — he would go a

The People v. Thurston.

whole day without eating; his habits about eating at other times were good—when he did eat saw nothing irregular about his eating; I conversed with my wife on the subject of his peculiarities at the time.

Cross-examined.—Never worked for him except these three months; came into this town a year ago last February; went to work for him when I first came; three worked with him besides myself—all working by the piece; this is the usual course of working at cabinet work; I have not been spoken to with a view of being a witness as I know of; Camp spoke to me about it; I told my wife I had seen Camp and we had a talk about this matter; defendant had one of these depressions about the second week after I went there; complained of the headache at this time; can't state how long that lasted; can't tell any particular time when he had the next; can't tell how many he had while I lived there; had more than one but can't tell how many; can't say that it is more than twice; don't know that I ever witnessed any of these turns except when he complained of the headache; have seen him on the bench more than once; can't designate any number of times; sometimes he would get up and go out; never knew him to get up and go to work; he worked most of the time except when he was complaining; was a good workman; worked more than common fast when he was well; did not work at the best work himself; had his hands work on as good work as he did; he sold furniture; what I saw him sell he sold at a fair price; bought materials for furniture; knew nothing except by report that he was visiting a young lady; was not married when I left his mother's house; can't tell how long after.

John Tillotson, sworn: I commenced work for defendant the last of March or first of April, 1847; was there until the last of July, 1847; I boarded at home during the time; I afterwards worked there again; came in year 1849 and worked until April 1849; I went there again in September 1850 and quit about a week before this occurrence; during the first time I was there defendant appeared to be low spirited; did not do anything to amount to anything, till just before I left he went

The People v. Thurston.

to repairing his house; they lasted pretty much all the time I was there; the first time he did not work in the shop over two weeks while I was there; was more cheerful at some times than at others, but did not work; sometimes he was in the shop and sometimes in the street, and sometimes he would go off and be gone for a day when I did not know where he was gone; when he was in the shop he appeared dull and lazy like; I told him he was lazy; complained of a pain in his head sometimes; used to wet his head in cold water; this was all I ever saw him do for it; sometimes he would set on the saw bench and hold his head, sometimes he would lay on it; would rest sometimes an hour and a half at a time, holding his head; held it with both hands; when lying down on the bench he would lay on his back with his face up; don't recollect of seeing him lie so but once; have seen him set so a number of times; can't tell how many; his habits of conversation were pleasant; conversed about the same as usual; did not give usual directions about work without he was asked, then sometimes he would not; would tell me to do it as I was a mind to; never saw any person have just such turns as he had; the second time I went there he worked more in the shop than the first; saw something of these turns but not as often as the first; can't tell how often I saw him sit holding his head with his hands; was there three months; this turn lasted about a week — the last, three; did not complain of any ailment; was about the shop not doing much of any thing; he was not in the shop much of the time; the last time was about his house, fixing it; don't recollect that he was lying down any of the time; knew nothing about his costiveness except what he said — he said he had not been out for a week; he made this complaint several times while I was there at the different times; I know he and Garrison were on good terms of friendship; have heard defendant speak highly of Garrison; should think from his manner of speaking of him that they were more than common friends.

Cross-examined.—Defendant was some two weeks preparing for housekeeping. I worked for him when he was married; he

The People v. Thurston.

was married on the 25th of October. Think he bought the place about a year and a half before, in 1849; I think he paid \$900; told me so at the time. Some one else lived in the house when he bought; he took possession of his house the first of March before his marriage; when he took possession he prepared it for two families; I was living with him then; he fixed up the house and rented it for a year; don't know how long he worked at his house when preparing it for two families; after he was married he was about his shop and seemed to be cheerful and attentive to his business. He did not get to house-keeping till after I left; was laying a new floor and altering partitions about his house; used to see him days when I was there; I saw him on Monday before this transaction happened, and after I left; he was in the shop at work; he appeared rational as he usually is. This was the last I saw of him until I saw him in court.

John S. Barber, sworn: I reside in Coventry, Chenango county; I lived here six years ago this fall; worked for J. M. Thurston some time, from three to six months; I think I boarded with his mother most if not all of the time; slept with him a part of the time; I think most of the time; I know of his indulging in a certain practice called masturbation; I should think he indulged as often as every night, or oftener; it was the cause of my not sleeping with him any longer; he continued it as long as I slept with him.

Cross-examined.—I should think I lived with him about a month after I refused to sleep with him; I would not be positive about his indulgence every night, but it was nearly every night. I should not like to state positively that it was as often as twice a week nor once a week, nor once a month, but I remember that he practiced it as a general thing; I don't wish to change from what I first stated, it is as far as my memory serves me.

Fanny Ransom, sworn: I am the wife of Prentice Ransom, sister of defendant, and live in this village. I have known peculiar conduct and habits in my brother; about seven years ago he became inattentive to his business, wandered about,

The People v. Thurston.

took long walks, spent nearly the whole day, was absent from dinner sometimes, came in late in the afternoon and asked me for a cold dinner, saying he had been walking; this peculiarity of conduct continued a number of months, perhaps a year; I recollect, at least during cold and warm weather, his conduct was the subject of family remark; his inattention to business caused anxiety, and we often spoke of it in the family; his irregularity in eating, sometimes going almost entirely without, at other times eating excessively, was also a subject of anxiety. I did not know what was the matter with him; after a time we saw that his countenance was pale, and we discovered that he had the piles and was constipated. He seemed sad and appeared friendless; I do not recollect any thing about his eyes at this period, only a general sadness; he was careless in his dress; disregarded his appearance; was not cleanly as formerly; would go ragged sometimes. After this turn of about a year, there was a change again, he became excessively industrious; would work very late at night and very hard; so much so that he again occasioned anxiety. At this period sometimes he seemed excessively fond of dress, at others perfectly indifferent; sometimes he would get a great deal of clothing on hand, at other times he would be so destitute of some articles that he would have to borrow of his brothers; he would speak of getting a suit or a garment and talk of it so much that we would feel disgusted and think he was silly; he would give large prices sometimes for putting extra work upon garments. From the time of returning to his business, about six years ago, his habits have been very irregular; sometimes he would be very industrious, and then he would be the reverse, and irregular also as to food; I don't recollect the length of the intervals between these spells of inattention to business; there was a time three or four years ago also, when he was very irregular; I think for months, or at any rate a considerable long period; we were very anxious about it. During the first part of the six years I know these spells were occasional, but later than that they have been more frequent, quite frequent, during this last year as often as from three to four weeks; I know they

The People v. Thurston.

were very frequent; I could not tell the exact time. These spells were worse toward the latter part of the time, and continued to increase in violence up to the time of his arrest; they usually continued from two to five days; sometimes I have known them to last a week; they seemed to be of longer continuance as time advanced. The general character of these spells was that he was sometimes very pale, and at other times his face would be very much flushed, much colored. He would say, when asked what was the matter, that he had a distress in his head, a bad feeling in his head during the last two years. He had the piles, was constipated, was subject to a loss of appetite; at other times he had an excessive appetite; sometimes he would come in, lie down on the carpet, clasp his hands over his head, at other times he would clasp his hands behind his head; at other times, placing his head on his knees, he would clasp them over his forehead; sometimes he refused to talk, could not converse, did not wish to hear conversation; sometimes he was silent several hours; at one time, lying on the carpet, he was silent a long time; sometimes he would come in and speak but a few times during an evening or an afternoon. I have known him to eat enough for two or three men when he said he was sick; he was always, during these ill turns, afflicted with diarrhea; this diarrhea followed the period of constipation. I have said he was often silent; at other times excessively talkative, talked a great deal upon little things, and would talk upon them until he seemed very silly indeed. As a general thing, he was in my house almost every day; I gave him medicines for these indispositions; he sometimes asked me to press his head; at one time he asked me to pour cold water on his head. During the last year or two his eyes were very wild, very glaring at times; and the last year a few times they were blood-shot. During the last winter I noticed similar turns and very severe; the last one I remember was in the early part of January last, I met him in the street, he was deathly pale, his eyes were very wild, I asked him what was the matter, he told me he had that dreadful feeling in his head, and asked me if I would go home and give him some medicine; I told him I would go very soon,

The People v. Thurston.

and did go, but he did not come. I had a case of homœopathic medicine and gave it out to members of my family. I should think I saw him next at father's house, three or four days after; I went to see him but he was not in; I think it was the next day after I met him in the street; I went again the day after that, but I don't recollect whether I went there to see him or on other business, but I did not see him then. I went again some days after, and found him in bed throwing himself from one side to the other; he had drawn the bed and pillows into the center of the bedstead, and was tossing himself about; I asked him what was the matter, he replied, this dreadful distress in my head. I found his face very high colored and his pulse very quick; the cords of his neck were very much enlarged; he said he could not lie still, he was in so much distress. I pulled up the feathers as well as I could; drew him to the fore side of the bed and held him with one hand and made passes over his head, as he often wished me, with my other hand; his general habits of sleep I knew little of; he would sometimes say he did not sleep; I gave him medicine for his head; I thought the blood was rushing to his brain; I attempted to relieve no other difficulty except that of his head; his eyes at this time were dreadfully wild, bloody and red, and very large; he glared them in my face until I was horrified; I said he was a crazy man; I told my mother, I think, or at least my husband, when I got home, that he was crazy; this was in the early part of last January; I saw but little of him after this; I saw him at my father's house the day of the occurrence which has brought him here, between four and five o'clock; my mother, Mrs. Garrison and my brother's wife were present, and I think the little child was in the house. My brother and Garrison were on the most intimate terms always; their friendship had existed for many years, before the marriage of my sister and ever since; there was a conversation on that day between him and Garrison; he had been to see Garrison; don't recollect of his saying what Garrison did say; he told his sister that she must let Garrison have the child and must not resist him; he thought as the child had come in the morning she would be

The People v. Thurston.

inclined to come again, and the father would allow her to do so; he said the law would give the father the child, and that the father loved the child as well as she did; a short time before my sister left her home he was at our house and invited me to come and see him; he said he had the happiest home of any of us, and wanted we should come there and see how nicely they were living; he was very pale the day of the fatal occurrence, and his eyes were very wild; he complained of having to be up late in drying the plastering of his house, and not having slept; I don't think he had been well for weeks; when any one spoke in unfriendly terms of Garrison, he always said he felt that Garrison meant to do right.

Cross-examined.—I have been married twenty-one years; I have living four children; have kept house on Main street in this village, since two or three weeks after my marriage, only a short distance from my father's house; John's wife has had a child; a mature living child, but not now living; I have not studied the subject of insanity; have read no books on the subject; have had conversation with my mother about my brother's singular appearance two or three times; since the catastrophe, I have spoken with Mr. Camp upon the subject, though but once I think; I was at my father's house during the last two or three years, two, or three, or four times a week, and remained sometimes an afternoon or an evening, or an hour or two in the morning; I did not always see my brother; he was at my house very often; sometimes he would come every day, sometimes two or three times a day, then again not in some time; after he purchased his house he made some alterations and rented it; I think he superintended these alterations; I never remained any time in his shop; there were circumstances connected with our own business that made me know he worked hard; I don't know personally that he worked late; there was an occurrence, I know, about that time that troubled him; there was a person here whom he professed some attachment for during the last part of the year that he neglected his business; it was the very last of the year; I think a paleness like his is very uncommon; I do not know that paleness is a

The People v. Thurston.

common symptom of headache; I know but little of other people's diseases; it was the week he commenced house-keeping that he invited me to come to his house; he commenced house-keeping on Monday and this occurrence was on Friday; it was at my father's house that our family were assembled; I was there the most of the afternoon up to five o'clock; had heard of my sister's leaving her house before I went — the next morning I think after she left; I did not see her I think before I met her at my father's; the interview of John with the rest of the family that day was short; he spoke of having seen Garrison that day; he did not state in my hearing what was the result of the interview between him and Garrison; he said that the father was entitled to the custody of the child; I don't think I heard him say he had held any legal consultation on that subject; he told her she must bear her trouble patiently; she seemed at times to vacillate about returning to her husband; she did not tell me her difficulties; she was quite anxious to have the custody of the child and thought she could not give her up to her husband; my brother left the house before I did; he staid only a few minutes; I understood that Mr. Garrison was to come that night and see about the child; they did not know what he would do about it; John did not complain of a headache that day in my hearing; I noticed he was very pale as he passed the window and as he came in at the door; he could not have come from Mr. Garrison's then because he came from another direction; my brother never told me that he would at some future time give me the detailed reasons for killing Garrison — no sir, never; he said he wished he could tell me his whole heart and how he felt.

Prentice Ransom, sworn: I am the husband of the lady who has just been sworn; I have heard her testimony; my wife spoke to me the fore part of last January on the subject of defendant being deranged; I saw him the same evening; when I called to accompany my wife home I went into his room; he was rather quiet when I saw him; was said to be better.

Miss Nancy Thurston, sworn, says: I am the sister of the defendant; I was at home in 1845; have been absent one year

The People v. Thurston.

since then in 1847; have not been absent since that time longer than two months; for the last two and a half years have been at home all the time; I have seen much of the defendant while I have been here; in 1845 he was very unlike my other brothers, and very unlike his former habits of business, and was not well; was inattentive; was negligent in regard to dress, so much so that it worried me; at other times was very extravagant; these spells lasted some months; we were afraid he was going to relapse into his former habits of inattention to business; in 1845 he was so negligent that we were afraid he would not sustain himself in business; this lasted about a year; he would sometimes be gone from home; could not find him for half a day and sometimes for all day; have gone to his shop myself with persons who wanted to see his furniture; there were periods that year that he worked, and when he did work he worked immoderately; we found that he was out of health, that induced a charitable feeling towards him; it was a matter of family concern; we talked about it frequently; he complained of a headache, diarrhea and costiveness; sometimes his face was red; sometimes a dark red; and other times he was very pale, almost a lead color; complained of distress and agony in his head; I combed his head frequently; sometimes appeared to be a fullness in his head; he would put his hand to his head; he was very sad indeed; this melancholy appearance was the first to draw my attention to his health; his habits of eating were irregular; I know of his going without his breakfast and dinner; know of his forgetting that he had not had his breakfast; thought he had had it, so negligent was he of his food; at other times he would eat excessively; I know that he was troubled in his sleep; wished to sleep below; used to walk late evenings; wished me to walk with him after the usual hour of retiring, because he could not sleep; noticed a wild appearance; two or three years ago he had a like spell, then complained of his head, with constipation, piles, and diarrhea; this rested upon him, certainly two months, perhaps more; his spirits were very much depressed; it was very painful to see him so much depressed; would not

The People v. Thurston.

talk much; is usually communicative; then again would be extremely talkative; subjects, trifling, such as modes of dressing, combing hair; he would come into the house and lie down on the carpet, and put his hands on his head; sometimes on the fore part and then on the back part; complained of agony in his head; I used to tell him to go to bed; disliked to have him lie on the carpet; told him if he was sick to go to bed and make a business of it; used to bathe his head; when reading, have heard him complain of the blending of the letters; said the letters all run together; said this when reading to me; at times he was restless, indisposed to sleep; two nights I knew of his leaving his room after he had retired; heard the door and supposed it was him; went to his room and found he was out; kept a light burning; after a while he returned; said he could not sleep; wished to lie on the settee; he slept there all night; on another morning when I arose, found him on the settee; also found him setting up one night in his room; said he could not sleep; habits of eating irregular; absent from his meals; used to keep his victuals for him; he would come in after breakfast, and I ask him if he did not want his breakfast, he said he had had his breakfast, I said he had not and I had saved some for him; after his spells of fasting he ate excessively; would come in between meals for something to eat; since 1845 his spells of depression were frequent; generally these fits of depression visited him once in four or five weeks; they rested upon him sometimes a week, sometimes shorter than a week; sometimes his face and eyes would be red and sometimes a deathly paleness; agony in his head; sometimes he would say if I knew how he felt I would not scold him; complained of costiveness, diarrhea and piles, spirits gloomy, habits of sleep as I have described; do not know the particulars so much as at the other times; I knew of a spell a few weeks before this occurrence; I saw him all the week the first part of January; he was depressed the fore part of January; I was home spending an evening, and he did not come in; mother said he was in his room; I went there and said, why are you

The People v. Thurston

so unsocial; he looked wretched; said he had a bad feeling in his head; told him he should banish these feelings as much as possible and be cheerful, that another's happiness now depended on him; said he could not help it; his look was strange; holding his head, his arms resting upon his knees; he wept and said he would go to bed if I would go and leave him; I did so; defendant and Garrison were very friendly, unusually so; it was unbroken; never saw a more constant friendship than theirs; defendant would say we were wrong if we ever spoke against Garrison; said he had a good heart; said he worked hot iron so much that it combined with his nature; that his nature had blended with the iron and he was not to blame for his iron-like manner; never heard defendant speak in any unkindness of Garrison; he was not well just before this catastrophe; had the diarrhea; was depressed; was repairing his house; had newly plastered it; had been there three or four nights keeping fires to dry the plaster; he moved in before the plaster was dry; said he kept up fires after he moved in; had been up the week before; told me how cold the nights were; he went home with me a short time before this; I lived at Ransom's; Garrison lived four or five houses beyond Ransom's; defendant's wife was at Garrison's; he was going after her; this was his principal business; he had agreed to go after her; after he reached Ransom's and I had passed through the gate, he turned around and started back towards home, and went in the opposite direction from Garrison's; went as far as Dr. Frank's; I then called on him and said have you forgotten your wife? he then said, I had forgotten I had a wife; he then turned around and went after her.

Cross-examined.—I have not generally resided at home; my home has been with Mrs. Ransom since I was a child, and have not resided in this village all the time; have been absent a good deal; never have been absent but two years; one year at a time; one year before and one year since 1845; have been from the village a good deal teaching; have taught at different distances from the village; one year in Oswego county, and one year in North Carolina; was also in Elmira a term and a

The People v. Thurston.

half. I have been at home for the last two and a half years; have always spent much time at my father's; during these years defendant has been in business; in 1845 he worked occasionally; I was at home and at father's; he worked less than half the time; I saw him every day unless he was absent; the last part of the year he became unluckily attached to a lady; she was a daughter of my mother's half brother; she was a stranger; stayed at my father's house while here; was there from autumn until winter; went directly home, I supposed; don't know that she became pregnant while here; never have learned that; it was reported so; that is all I know about it; knew nothing of it when she left; never suspected it.

Question.—Did you not know that the defendant was charged with it?

(Objected to by defendant's counsel — admitted and exception taken.)

Answer.—I did not know it when she went away.

Question.—How long was it after she left before you had any information about it?

(Objected to and exception taken.)

Answer.—I heard of it within a few days.

She lived in New England; I don't know that she went to Deposit, on the Delaware; heard of her marriage soon after she left; don't know when she was married; don't know that she was married at Deposit, to whom she was married, nor what countryman he was; can't tell what year she was married; he had been depressed the whole of that year before she left, and afterwards; appeared better after he returned from down the river; went down in March with Ransom; carried on his business; he was irregular from that time until he had the two months' illness, two years ago; nothing occurred to him then; no love matter that I know of; never knew that he addressed a young lady who received his addresses for a while; he spoke kindly of Garrison when others reproached him; they read a great deal together; a year ago last winter he was at home; can't say when he began repairing his house; he did not commence repairing his house before his marriage;

The People v. Thurston.

there was a family in his house and they left in January; he was anxious to get to housekeeping; very busy about his house; used to stay very late evenings; I was in his house two evenings, between nine and ten o'clock; knew that he had been working too much; knew that he had been to see Garrison on the 27th of February; told me in the morning that he was going to see him; saw him at noon; told me that he had an interview with Garrison, and that my sister could not have the child; said, perhaps he could reason Garrison out of the notion of keeping the child, it was so opposed to nature to keep the child away from its mother, said he would see Mr. Parker; at noon said he had seen Mr. Parker, and Garrison had a legal right to the child; told his sister that she must give up the child, that Garrison would see that he could not bring it up. Do not know as he said anything about her returning to her husband; did not mingle much in society; never knew of his omitting to take his meals except when he was unwell; when he recovered he eat more than usual; was soon satisfied.

Direct resumed.—The female to whom he became attached came here in the latter part of the year of the depression; she came in the fall. His depression commenced in the winter or spring before; commenced a number of months before she came. Defendant brought a beggar boy home with him soon after the fire in Owego; it was in the evening, we had been to tea; wanted me to give him some supper and bathe his feet; said the boy must sleep in his bed; said he would go down to Ransom's to sleep; he went out and I supposed had gone, but he soon returned and wanted me to go down to Ransom's and stay; I told him I would not; he then went out again.

Cross-examined.—When he came home he said he had a candidate for me in the kitchen. The boy was very ragged; had a very sore foot, so much so that we could hardly get his boot off.

Cornelius Williams, sworn, says: I live about three miles from this village, in this town. I know defendant; went to his shop April 8th, 1850, to buy furniture; his appearance was

The People v. Thurston.

wild, his eyes looked large; never saw him look so before; he turned round and round a number of times; I left the shop; I felt afraid; I thought something ailed him. I said after I got home, that he was either crazy or had been drinking; never knew that he drank. Never saw any person's eyes glare as his did; I went over to Ogden's shop. (It was conceded by the prosecution that the prisoner had always been strictly temperate.)

Cross-examined.—I was born here; I have lived here ever since; am twenty-nine years of age. Wanted to buy chairs, four Windsor chairs; went back and bought the chairs. The same day, two hours after that, he seemed to be quite well; no one else in the wareroom while I was there; was not angry; I found him in the back shop; don't know how many there were with him; I called him; can't tell what was the matter; did not notice it when he first came out. I told him I wanted to buy some chairs; he named a higher price than I gave; can't tell what I said. I went to another shop to see if I could not get them any cheaper, found them about the same; went back two hours afterwards; can't tell what was said about the price; it was lower a great deal; it was six shillings a piece at first, and he lowered to seventeen shillings for the whole; bantered him some; did not like his price the first time; I think I told him I could get them cheaper at another shop; don't remember what he said, or what he did. He acted wild and crazy; he kept stepping around and turned around; set the chairs around very smart; did not tell me how they were made. I remember the time, for I went to work at Ingersoll's on the 11th, this was three days before.

Direct resumed.—I did not think him hardly right the last time; eyes did not look so bad.

L. H. Allen, sworn for defence: I reside in this town; I know defendant; met him at a public meeting, can't say when it was. I remember a sentiment which he advanced in some connection with the meeting, defendant made some remarks about education, said he believed it was productive of more evil than good, that it was more calculated to encourage evil and iniquity than

The People v. Thurston.

morality; did not notice his manner or appearance. What he said indicated a certain state of mind. I thought at the time, the man was in a fair way to be crazy.

Cross-examined.—The remark did not go to support any system; he did not speak more than a minute or two. I think I have given the language, think defendant is opposed to slavery; is called a member of the abolition party, think I have heard him drop an occasional remark; the subject of his remark was education, and not any system of education. The meeting was in the Court House; can't now recollect the subject of the meeting; can't say the meeting had any relation to schools. I came here in 1831, have been a practicing physician; knew defendant when a boy, he lived with me a few weeks, fourteen or fifteen years ago, lived with me as a boy. I have known him since, can't tell how much he has lived here since; have known him as a man of business.

Mrs. Fanny Thurston, sworn: I am mother of defendant; since he commenced business there have been peculiarities in his deportment and habits; it commenced in 1843; this is earlier than my daughter spoke of in 1845, then a great change came over him, it was in the fore part of that year; it lasted over a year; formerly he had been active, he then became inactive and stupid; did not attend to his business; negligent about his dress, spirits low, at times would hang his head and press it, and tell me not to speak to him, it would kill him; said if I knew how bad he felt I would not speak to him; his face would be red and eyes swollen; the next day he would be pale, eyes bloodshot. He boarded with me; complained he could not sleep, wanted to sleep on the lounge; I said it was too short for him, but he would sleep there, and I placed a chair for him to lay his feet on; he was irregular about eating, has gone all day without eating; when he did eat he ate excessively. Was costive and then relaxed; seemed to follow each other; he has often observed so to me; afflicted so for a week at a time, perhaps more; he was afflicted with bloody piles, often so that he would be pale; I have noticed from his clothes some indications of the piles; since 1845, sometimes has been very industrious and sometimes very slack;

The People v. Thurston.

would remain so some months, the spell would come on him sometimes once in three or four weeks; the distress in the head would sometimes last but a little while; sometimes he said there was a tightness about the head, wanted it pressed; eyes rolled around. Spells came on from time to time since 1845, they continued to grow worse; the last two months he was very bad, he appeared to grow silly; we were afraid he would lose his manly powers, his reason; spoke of this to the family. He said sometimes that he was becoming crazy, sometimes an idiot. Never saw a person in their right mind that looked like him; would stand with a strange look, a minute or two, look vacant. On the last part of the first week in January, he was very bad; we were afraid he was losing his reason. On the night of the 16th he grew very bad; I told the family that he was crazy; he sat down to the table and helped himself to food, did not eat any, got up and went away, walked around; heard Mrs. Ransom's description of his illness; had told her that he was crazy before I saw him in his sickness, I concur with her in her statement. Defendant was drying plaster in his house a few days before this unfortunate occurrence; the weather was cold; he remained from eleven to one o'clock at night; he had been up quite a number of nights, perhaps a week; the plaster was not dry when he went in. I was at defendant's house; went there after tea, early in the evening: found defendant and his wife, James Thurston's wife and Mrs. Garrison and child. They sat conversing when I went in; Mrs. Garrison requested defendant to go after Garrison; defendant wanted her to be calm and give up the child; said Garrison would give up the child again to her; defendant said it was getting so late he might not come; she said, oh, go and see him and talk to him; no one came with him when he first came back; he came in alone, said Garrison was at the door and wanted the child; she said he must come in after it, she could not force her from her; Garrison came in and took a chair; the child was in the mother's lap; the child cried, and he said, "why, what do you cry for?" he took hold of the child, and she screamed louder; saw something which passed before my eyes like a glimmering This

The People v. Thurston.

is all I distinctly recollect till I stood holding Garrison's head; defendant stood by my side doing nothing, stood perfectly still; did not see his looks until I took hold of his left arm and shook him, and cried out to him, what have you been doing? he turned around and laid his hand on Garrison's arm. As he turned I saw him for the first time; he looked awful; his eyes looked like looking over a precipice; looked strange, appeared to look off at a distance; I continued to shake him; he did not appear to move; I shook him again, and he then spoke the first word; he stood a while and said it was no use; I then saw the wound, and saw that it was no use. In the afternoon was unusually calm, but pale; said Garrison had sent for him; he was then exhorting her to give up the child. He looked bad, fastened his eyes upon her, and had a strange look while talking with his sister.

Cross-examined. I went to my son's house at early candle light; this was the first time that day; he had been at our house in the morning; after breakfast remained one half hour; Mrs. Garrison was there I think; think the child was in the room; we had a conversation about going to see Garrison; I observed to my son that these things were unhappily so; I told him to get some friend of Garrison's and go and talk with him; wanted some man that understood law; I mentioned Mr. Davis; defendant thought Davis was not so cool and deliberate as Parker; he suggested Parker; said he thought he knew law as well as Mr. Davis; he wanted to inquire whether the law would give the child to Garrison or to Mrs. Garrison; he went and saw Parker and said the child belonged to Garrison according to Mr. Parker's opinion; said Parker thought he had better get some one else to go and see Garrison; something said about Dr. Lovejoy; defendant said he thought if anybody on earth could prevail on him he could; he thought he would do better than any other person; he went to Parker for advice and Parker told him to get some other individual to see Garrison; he went expecting to see Parker and Garrison soon after he left our house; the difficulty between Mr. and Mrs. Garrison was talked about in the family; he left our house very soon

The People v. Thurston.

after breakfast; saw him next at noon; think he eat dinner at home; did not have much conversation with him after that; at noon he said that Parker said that the law was on the side of the father; that the father was obliged to support the child and was therefore entitled to the custody of the child; said he had been to see Garrison; told me nothing that had passed between him and Garrison; said we need not have much hopes of his giving up the child; Mrs. Garrison said she was afraid he would carry it away; defendant said he would do no such thing; he was permanently here and desired the child's happiness; would after a while let the mother have it; we met again at tea time at our house; I think I was through tea; part of the family had not been to tea; no conversation; he said mother won't you come over this evening, as usual; nothing else said; he left and went home; I went over in a few minutes, remained there a few minutes; can't tell the length of time before Garrison came; my son said he talked of coming; the little girl went back and forth from my house to defendant's that day; I heard no conversation except defendant's trying to pacify his sister; said she must give up the child calmly, he said it was the best and only way; defendant was in a weeping mood and said, do it right, don't make a fuss; she said she supposed she must; Mrs. Garrison is not very quick tempered; can't tell whether the defendant was what we might call quick tempered or not; might have been hasty or spirited; more so formerly than late years; think his temper has changed; I saw defendant going out at the door after Garrison came in; should rather think he opened the door; think the door was shut because it was cold weather; don't remember whether he closed the door when he went out; can't tell how long it was from the time he went out till he came in; Garrison took the child from its mother's lap; the child clung to its mother and screamed; don't remember of his asking her to come to him; nothing but the glimmer of the blow that I saw; I knew that the defendant called upon the lady he afterwards married; knew that they corresponded together when she was at Syra-

The People v. Thurston.

cuse; he said he thought of marrying her; spoke of her good qualities; never asked my advice about it; he had rented the house to two families; along when he was paying his addresses to the young lady; when he was preparing for house-keeping he repaired his house; tore down partitions and made new walls; he is now thirty-one years of age; can't say that he opened his shop immediately after he was twenty-one; he has usually boarded with me; has had from one to five hands to work for him, just as it happened; when he first opened shop I should not think he had any one with him; the first I noticed was a change from perfect activity to stupidity; sometimes he would work very hard and then he would not work at all; stand around and do nothing; noticed this some in 1843; he seemed to be melancholy when he had the headache; he would have times of standing still sometimes since 1843; stand any where, sometimes in the house and sometimes lean on the table; sometimes lean against the post and stand and look; he has said singular things to me; said, I really believe I am getting crazy; his wife told him so too; I have heard him talk in a wandering way, speaking on religious matters; they were so disconnected I could not remember them; can't remember anything till the last two months; I have heard him speak disconnected things upon religious subjects; can't mention the language; don't remember of hearing him say he was getting crazy until the last two months; he would complain of his head, at the time he made the remark that he would be crazy; he made this remark two or three times; would not go to work the same day; this agony in the head would not last but a short time; he would say don't speak to me you will kill me; the next day he would say mother I did not know what I was about; he would talk around the next day; sometimes the spell would last but a short time; the diarrhea would follow the spells; was never dyspeptic; he never took much medicine; I don't know what he took for his piles; he once had a box of ointment; don't know as he had a physician called, he may have had.

John M. Parker, sworn: I am counsellor at law in this vil-

The People v. Thurston.

lage; I was some acquainted with defendant; in February last he consulted me; it was on the day of the occurrence in the forenoon; his manner was very earnest; there was something in what he said and the manner he said it that struck me as singular; thought I noticed his mind operated peculiarly.

Cross-examined.—He consulted me on the right of Mrs. Garrison to have the child; he said he wanted to consult me on a subject somewhat unpleasant; sat down at my table; said Mrs. G. had the evening before left her husband's house: he was with me an hour; said Mrs. G. had formerly been a Methodist, that she had withdrawn from them and had lately united with them again; he then stopped and said he thought such organizations were unnecessary; said he and G. agreed on the subject; spoke of government organizations; thought they were all unnecessary; said Mrs. G. had been out the evening before to a donation party to the Methodist minister's; that Mrs. G. came in late at night, sat down: Garrison asked her what time it was; she told him he could look at the clock and see, and he then took hold of her and dragged her into a little room where the child lay; that the child screamed; he went to take hold of the child and she escaped from him; he then said she once before had to leave and she thought it was unsafe for her to return to him; he then said he knew him and said he had a bad organism, and he thought it would not be safe for her to return; he said he advised his sister to make up her mind whether to return or not; said that Garrison had sent the child up there that morning and wanted to know if Mrs. G. could retain the child; I told him she could not; told him he had better see Garrison and see if it could not be amicably arranged; said he was going to see Garrison; said his family thought he had better not, that he was too excitable, but he said he thought he could have as much influence with him as any one except Dr. Lovejoy; he then went to see Garrison; when he came back said Garrison did not want to talk much about it then, but would come to his house that evening; did not much think he would give up the child; said he wanted to say a great deal about it; started off, went part way down

The People v. Thurston.

stairs; came back and said if I saw Dr. Lovejoy wished me to tell him to go and see Garrison; I know nothing about their religion; nothing except what Thurston told me. What he said that I thought singular was what he said about Garrison, organism, and the church and government organizations.

Almeda Garrison, sworn: I am the widow of Anson Garrison; Mr. Garrison and defendant were on intimate terms of friendship; their intimacy was never broken off till his death. When any one censured my husband, defendant would take his part; I never heard an unpleasant word between them; they were much together. Defendant said he could not help it, that his works affected him, that the iron affected his nature. I went to my father's the night before the unfortunate occurrence; staid at defendant's that night; they had but one bed up, and defendant slept upon the floor; he said he was keeping up fires about that time drying the plastering in his house; he was up a number of times that night, went out two or three times, brought a pitcher of water to me and said he did not know but I would want it, I was so restless; should think he was up a good number of times; said he had the headache, was pale. In the morning he prepared to go and talk with Garrison or some of the friends; in the afternoon he said Garrison had sent for him and wanted him to come down; when he came home in the evening he said Garrison was coming after the child and I must give it up, said Garrison loved the child and would take good care of it; Garrison did not come that evening as soon as expected; I suggested to him to go and talk with him; said he did not think Garrison would come, and I had better have a night's rest before I settled it; I then told him I could not wait till morning, and requested him to go for him, I wanted to have it settled; he said he supposed he could go if we thought best; he went and returned very soon; Garrison took the chair and removed it up near where I sat, a little distance from the stove; I was weeping, I did not see the occurrence; the first I saw of defendant I spoke to him and saw he looked very pale and wild, stood like a statue, with his arms down perfectly still, appeared to be looking at a distance; his eyes were very large and glassy,

The People v. Thurston.

was not making any motion, occupied this position but a short time. I asked how he could have done such an awful deed, did not look at me, appeared to be looking at a distance, not at any thing. I heard him say, or else heard some one else say, "he could not help it," don't recollect distinctly.

Cross-examined.—I did not see defendant when he put on his outside coat, think he had it on when I noticed his strange look, was not buttoning it up; can't say that he had it on in the evening while in the house; don't recollect of seeing defendant go out.

Hammond D. Pinney, sworn: I know defendant, and have for ten or twelve years; knew Garrison before his death, about the same length of time; I was acquainted with both and always supposed them to be on very intimate terms.

Cross-examined.—I have known defendant as a business man and have dealt with him; my business is drugs, medicines, oils, paints and varnish; have done business with him personally; his habits were not different from other men; have purchased of him; used to be there frequently; purchased of him frequently; never saw that he was different from any other man.

Direct.—Never saw any of his fits of depression.

B. Goodrich, sworn: I live in Speedsville; lived here nine or ten years ago, during a term of school; Thurston practiced masturbation the whole time; I tried to prevail on him to abandon the habit.

Cross-examined.—I was a boarder with him during fourteen or fifteen weeks, a term of school, and slept with him almost continually. This practice occurred almost every night.

Lucius B. Hudson, sworn: I reside in New York; resided here five years, when a very small boy, eight or ten years old; am twenty-one now. I slept with Thurston; knew of this practice while I slept with him; am sure it was frequent, but can't tell how often.

(Dr. Allen here stated that witness and defendant lived in his house at the period stated, and that it was fifteen years ago.)

Catharine A. Tanner, sworn: I know Mr. Thurston; have known him several years; never saw any thing strange in him

The People v. Thurston.

excepting once when he was at our house, one evening, a year and a half ago; I think he seemed to be talking a great deal, and kept moving his chair around in the room. He came just before supper; my husband was at work at the depot where he went after supper, and I thought Thurston would go when he did, but he staid after *Jim*, (my husband,) went, and he acted so strange that I was afraid of him; he did not go till after *Jim* came home, and I scolded at him for going away and leaving Thurston with me alone; told him Thurston acted so strange I was afraid of him; he looked wild, kept looking at me and moving his chair around the room, sometimes walking backward and forward; never saw him so before; never saw any other person so. I had been his washerwoman some time, and from what I saw on his clothes, I should think he had the piles.

Cross-examined.—I noticed this appearance on his clothes a good many times; washed two years for him.

Question.—How did the clothes look?

Answer.—(Witness hesitating) That is a question they said they would not ask me in court.

Mr. Spencer.—Well, they have not kept their faith with you, have they?

Witness.—No sir, they have not, (with great emphasis.) He talked about the slave question for one thing; did not talk much on any particular subject; talked so fast, and about so many things that I don't remember all he did say; one thing he said, he was not well calculated to get along in the world and get property as *Jim* and I did, he was so bad in his head; he said that was one of his great failings, his head was so he could not attend to his business; don't now think of any thing else he said; I forget, it is so long ago, and I never expected to have to tell it.

Direct resumed.—*Question.*—What was the most strange thing you noticed in him?

Answer.—His talking so fast and running on as any foolish person would.

Mr. Dickinson, for the defence, here stated this to be all the testimony that they wished to introduce, except that of the

The People *v.* Thurston.

medical witnesses, and desired them to be examined after the whole testimony, on both sides, had been presented.

Mr. Spencer, for the prosecution, thought it was usual, when a defence was presented, to go through with it. They wished to try the case with an open hand.

Mr. Dickinson claimed the same thing for the defence, but said if testimony of a new character should be introduced they would have to call the medical witnesses over again.

The Court thought the defence had better proceed.

Mr. Spencer assured the defence that the further evidence to be introduced by the prosecution would be of the character of Mr. Pinney's.

Mr. Dickinson.—That is enough. Then we will proceed to call our medical witnesses.

Dr. Nathan D. Benedict, sworn: I reside in Utica, and am the physician and superintendent of the New York State Lunatic Asylum at Utica; I have been subpoenaed on both sides of this case; I have been familiar with the insane about five years; have had charge of two large establishments, and perhaps in all not less than 3000 insane patients; I left 463 or 465 in the institution at home; I first saw John M. Thurston in the Spring of this year; I believe he did not know my professional character; I attended him in the cell; spent two or three hours in the morning and about the same in the afternoon—perhaps four or five hours in all; I conversed with him, observed his conduct and appearance, and formed the opinion that he was not in a sound state of mind; he was in a state of mind bordering on insanity; the influence of being confined upon a mind inclined to insanity would be variable; if there had been excitement before, the mind would be likely to become calm, and the dejection of a melancholic would be increased; I have not examined him this time, nor visited him since I came; he has now less power of mind than he had last Spring; I think so from my casual observation of him; I have been present in court most of the time, and heard all except the direct testimony of the first witness yesterday morning, (Mr. Barber.) I have read the evidence given prior to my arrival; the evidence

The People v. Thurston.

presents to my mind a very extraordinary case; I have never seen one exactly like it, nor do I know of a case on record precisely like it. This case I am constrained to think, taking all the various symptoms as stated by the witnesses to be true, and taking all the circumstances together, is one resembling, if it be not decidedly such as is described in the books as instinctive or impulsive mania; I believe that to be a form of insanity, although I do not know that it is a form universally allowed; I believe it is allowed by the most of persons conversant with the insane; the case embraces all or many of the features of an ordinary case of insanity, as it commences and progresses to its completion. The history of the case shows it to belong to a family where insanity prevails to a great extent; he appears to have been a masturbator which in nearly all cases affects both body and mind; he appears to have had physical disease, disease of the body, constipation, piles, headache, and these headaches accompanied by depressions, stupidity, dullness, unhappiness and occasional excitement which was denominated by some of the witnesses as "crazy;" they seemed to present to my mind a train of circumstances which would lead to insanity; the act itself, perhaps, to my mind presents the strongest feature of the case, being almost entirely without motive. I have not been able to see any premeditation, and if we believe all the testimony, there was entire unconsciousness at the time of the act, and no attempt at escape or concealment; in my interview with him he desired execution, desired to die; I think it a case of approaching dementia; the whole subject of insanity is to me a very difficult one; the more I observe the insane, the more difficult I find it to decide as to the sanity or insanity of those cases that most nearly approximate to the sane; I believe there are forms of insanity without any hallucination or delusion.

Question.—How far would the friends and neighbors in the ordinary transactions of business with him be apt to detect his state of mind?

[Objected to, but the Court ruled the question admissible.]

In all the forms of insanity I should place very little reliance

The People v. Thurston.

on what ordinary observers say; in impulsive insanity the act itself is often almost the only evidence of insanity; I speak of the antecedent and subsequent state of the person. Hereditary taint is considered one of the frequent and common causes of insanity; I believe there are cases where there is no other cause but hereditary predisposition; insanity is supposed to produce masturbation, as well as masturbation insanity; some entertain the opinion that masturbation is the evidence of insanity, rather than the cause. The mental feelings and internal condition of a person rather than any external cause operating upon him, produce these impulsive paroxysms. I believe the condition of the insane, immediately after an outbreak, to be usually very different; my own observations and reading show them to be very different; I have known cases where there was no consciousness of the paroxysm; the paroxysm was a blank, and they had no knowledge of it whatever; I do not now recollect any particular case described in the books. We have a large number of patients laboring under homicidal and suicidal monomania; what are termed monomaniacs are generally rational upon all subjects except the one upon which they are insane; I have one patient who is entirely rational sometimes for four months at a time, and then becomes suddenly entirely unconscious and very suicidal; I should say the insane are as variable in their insanity as sound minds are in their sanity, or in other words, there is as much difference between insane men as between sane men; the insane present all the combinations and mixtures and peculiarities of character that the sane do.

Cross-examined.—The patient I spoke of is a female; she has been there about a year and a half; it is very difficult, as a general rule, to detect and decide upon the doubtful cases of insanity; there is no difficulty in well marked cases; I should think there was no difficulty in the popular mind as to what they call insanity; it gives external evidence as a general proposition; as a general rule insane persons are not paroxysmal; I believe this instinctive, impulsive form of insanity.

The People v. Thurston.

is one that is now generally admitted by authors and persons familiar with the insane.

Question.—Can you give any sort of means whatever by which when persons commit these acts of crime, we can judge with any safety at all between the guilty and the innocent?

Answer.—I should think every case would have to be judged of separately and by its circumstances. I believe most cases of impulsive insanity present rather stronger symptoms of its approaches than this. I consider the evidence in this case has shown strong ground for believing that the mind was not in a healthy condition a long time before the act. The piles do not ordinarily produce insanity, nor does constipation, nor diarrhea. Sick or nervous headache often affects people in early life, and they become free from it in advanced age; people are often melancholy and distressed without ending in insanity. People are often unhappy without being melancholy; melancholy is almost insanity. I should say that low spirits and melancholy are premonitions of insanity; I should think if melancholy continued for weeks it is like insanity; one of the symptoms of dyspepsia is low spirits; dyspepsia sometimes continues a long time without ending in insanity, and it sometimes terminates in insanity; it may be called one of its terminations; dyspepsia may be the result as well as the evidence of disease; it does not arise from the liver; I do not know any connection between the bile and dyspepsia.

Question.—What means have we who have not read medical books, better than the ordinary transactions of the business of life, to judge of the sanity of men.

Answer.—Probably there is no one better evidence of sanity than that. I should look upon a descendant from insane ancestors as more likely to become insane, and upon that as a predisposing cause. I should think hereditary insanity showed itself, not rarely in descendants. In examinations I endeavor to discover whether insanity prevailed in the ancestors; to know that, adds much to the knowledge of the person, we get an idea of his constitution, we learn that he belongs to a family in which all or many of them inherit insanity, we form some

The People v. Thurston.

idea of how it is likely to progress and terminate, we make up our opinion of a case from all the facts we can gather, and that is one among many. In a trial of this description, the fact being established that the ancestors had been affected by insanity would throw light on the subject. It would lead the mind to give more weight to slighter symptoms; I should give more weight to them knowing that the patient belonged to an insane family; from my reading I should think masturbation not an uncommon practice, I fear not; that practice leads to almost any and all forms of insanity and shows itself in different ways, in different constitutions; physically it leads to debility, prostration and insanity, and if continued after incipency it terminates in dementia; its effect is loss of mind; it generally affects the nervous system; in the early periods of practicing this, the person often has physical strength to go and labor, whether physical strength would give way before mental depends upon the constitution. Every person has certain susceptibilities; that susceptible part of the system would be affected first. It would affect the weakest part first; I regard the nervous system as predominant with Thurston, that is the most susceptible; the brain is affected in all forms of insanity, and the brain is a part of the nervous system; I have not heard evidence which shows this to be a case of general insanity; I think it is not a case of monomania. There is one form of insanity called moral insanity; I believe insanity generally depends upon physical derangement; I regard this as a case of disease of the body affecting the mind; it is not necessary that there should be any extraordinary derangement before a sudden outbreak of violence; a very slight cause may produce it, a single constipation is enough in the case I have referred to, to make that patient intensely furious; suicidal insanity, is very much more frequent than homicidal, though homicidal is not uncommon. Thurston's conversation with me indicated derangement; I should not say there was proved a decided insane talking, on the contrary his conversation was quite sane generally; I have formed my opinion of his tendency to dementia from nothing else but looking at him; his appearance as it strikes my mind is a little different

The People v. Thurston.

from that of a dejected prisoner; there is a vacancy in the prisoner which is not indicative of the ordinary anxiety of a criminal; a short conversation with him or examination of him, I should not place great confidence in alone, but in connection with the friendship of the parties, they appearing to have been intimate friends, one of them the husband of his sister, he appearing to have been very fond of him, his intercourse with the victim seeming to be unlikely to be followed by such a transaction, all these make up my conclusion. The publicity of the act, the want of premeditation and preparation, and the absence, perhaps entire absence of motive, are all evidences of insanity; I have reflected on the difficulty between his sister and her husband, and on the influence the resolved separation might have exerted upon his conduct; I understand him to have agreed with his brother-in-law as to his right to the child.

Direct examination resumed.—I repeat that I believe it was an act of insane impulse, done without the control of the will; his holding the head would be only a part of his general conduct.

Dr. John S. Butler, sworn.—I reside in Hartford, Conn.; I am the superintendent and physician of the Connecticut Retreat for the insane at Hartford, have been engaged there between eight and nine years; before that I was superintending physician of the city hospital for three years in the city of Boston, in which there was a department for the insane; have lived in Boston and Hartford; nearly twelve years; have had between 1500 and 1600 patients under my charge; have devoted my exclusive time to this department since my residence at Hartford; I first visited defendant a fortnight ago Wednesday, the 2d of October; I presume he did not know my character as a physician; I was not introduced to him as a physician; after passing some two hours with him, I was led to the conclusion that he was an insane man, and all the observation of my visit led to that conclusion; my impression was that he was approaching dementia; I was not alone with him in the jail; before my visit was through I should have felt uncomfortable to have

The People v. Thurston.

been alone with him; I should have felt uneasy; I have not examined him since I have been here this time; I have been an attentive observer of him since this trial commenced; I listened attentively and heard the whole evidence in this case this morning, with the exception of the first witness (Goodrich;) I came here Tuesday afternoon, I believe before any evidence was given; taking the evidence that I have heard to be true, it appears to me that it shows the results of the habit of masturbation acting on a predisposition to insanity, and is, with the symptoms of general ill health as detailed by the witnesses, very indicative, previous to the act, of the formative stage of insanity, of which, weighing all the circumstances carefully, it seems to me the act itself was a development; it is in consistency with the previous history, and the act itself appears to me to have been the insane act of an insane impulse; I believe him to be now from his appearance an insane man.

The evidences of general ill health, constipation, piles, diarrhea, pain and distress in the head, flushed face, and the general appearance of the man, his manner at the time of the act and its inconsistency with his attachment to Garrison, are the principal points that I can now recall upon which I ground my belief; unusual sleeplessness is an indication of insanity, but I do not remember that there has been any unusual sleeplessness indicated; the few nights of sleeplessness and disturbance when he was up about plastering his house in a mind predisposed to insanity and when the disease was in a formative stage, would tend to a development of it; quite a proportion of insane patients from my knowledge and experience, are made insane by masturbation; it is a frequent cause of insanity; the conduct of the man after the commission of the act, taken in connection with the other symptoms, would tally with the opinion of his being insane; taking the history of the family and finding hereditary insanity on both sides in connection with his present state, it appears to me that hereditary insanity bears upon his case. It occurred to me when I first saw him that he was a masturbator; he appears now much the same as he did in prison; his present appearance and symptoms look back and

The People v. Thurston.

give force and truth to the testimony and the whole case; the present state gives force to the symptoms as well as the symptoms to the present state; his appearance favors the opinion I have given; the effects of the habit of masturbation and his history taken altogether, indicate that result; while he is in that transition or formative stage of insanity, it would be likely to develop itself and break out in an impulsive act; the evidence of his state at the time of the act, is not so conclusive to my mind as his appearance in the prison; his appearance in the prison was quite conclusive to my mind, and the act and his history previous, indicate certainly a very peculiar state of mind; it is a very singular case; I should have more doubt but for the interview I had in prison; but from that interview taken in connection with all the other circumstances, it does appear to me that the act was an act of insane impulse, and that the disease is ripening into dementia.

Cross-examined.—I visited him two weeks ago, at the request of Governor Dickinson; before seeing him in prison I saw none of his friends except his counsel; I received a paper from Gov. Dickinson, containing an abstract of the evidence before the coroner's jury; he read to me some minutes of evidence, I forget where taken or how; that was all the intelligence I had of his case before visiting him; I have no recollection of any particular conversation with counsel about his health and habits of life; there is such a thing known as assumed or simulated insanity; it is not common, but it is an occasional occurrence; when it occurs it is usually done to avoid the consequences of crime; my conversation with him of two hours, including the developments of this trial, are all the opportunities I have had to judge of this case; Mr. Camp and Dr. Allen, I think, were with me in the cell; independently of that visit, laying that aside as far as I am able to, and taking the proof up to the time of the transaction for which he is on trial, it appears to me that I do see in that act a development of insanity; it seems to me that that act was the termination—was, I may say, one of those insane impulses; it seems to me that the act was an insane impulse.

The People v. Thurston.

Question.—Is your opinion on that subject worth any more than that of any other intelligent, sagacious man, looking at all the circumstances of the case?

Answer.—It does not become me to say. Every murder does not furnish evidence of an insane mind; such inference does not follow necessarily from a sudden murder; the striking features of this case, that satisfy my mind that that act was the first outbreak of insanity, are the previous history of the man, his predisposition by reason of hereditary insanity, his masturbation, his ill health, and his manner on that evening before and after the act, all these lead me to the conclusion that it was an act of insane impulse; I think I should have drawn such an inference as that if I had not seen him after the act, though I should have been more doubtful and uncertain; still it seems to me that I should; his being able to work is not inconsistent with these symptoms.

A man may have a good degree of bodily health and strength and be a masturbator; masturbation carried to excess does not always produce physical weakness; as a general thing it does not until the latter stages; it makes one indolent but does not deprive him of physical strength; it affects the nervous rather than the physical system; it first developes itself upon the nervous system, making persons shy, jealous and suspicious; the evidence satisfies my mind that the prisoner practiced it to a very injurious extent; the habit with him appears to have been continuous; how frequently it might be practiced without producing a decided injury, would depend entirely on the constitution of the individual.

Where there is insanity in the family, it predisposes the descendants to insanity, and the existence of this predisposition would make other causes produce a greater effect than in persons who have not this predisposition; I would be led to believe the existence of insanity upon slighter evidence than without that predisposition.

Question.—Does it uniformly, or pretty frequently, or commonly happen that the descendants of insane parents become insane?

The People v. Thurston.

Answer.—Few in numbers, compared to the whole, become insane, just as few in numbers compared to the whole of man kind; though a greater proportion of those who have insane ancestors are insane, than of those who have sane ancestors; the thought of being deceived occurred to my mind when I visited the prisoner; I always remember that; my profession as having charge of the insane would not lead me to presume insanity more readily than another, because we are continually to be guarded against receiving those persons who are alleged to be insane, but who are not; I have the whole responsibility of that at home; there was a wildness about Thurston's expression, a singular and peculiar wildness, and a peculiarity of manner which it is hard to describe, but which excited my uneasiness in his presence; it would be difficult to assume wildness; it would be difficult to assume all I saw in the prison; uneasiness of manner is not difficult to assume; I do not often meet with patients who are ready to admit their insanity; I do not remember now any particular remark on that evening that indicated insanity; I saw no insanity in his telling his sister she had better give up the child; his working day after day is not indicative of insanity; carrying on his business, purchasing and repairing his house, are ordinary evidences of a sane man.

Direct examination resumed.—Are they at all inconsistent with the other evidences of insanity you have observed?

Answer.—No, sir.

Cross-examination resumed.—The proportion of the sane to the insane in this country is about 1 to 500.

Charles H. Nichols, affirmed: I reside at New York, and am physician to the Bloomingdale Asylum for the Insane, in which there are at this time about 120 patients now under my charge; was connected for two years with the State Lunatic Asylum at Utica, and have had medical charge of the Bloomingdale Asylum for two years and a half. I first saw Thurston on the morning of Tuesday of this week, when I had an interview with him alone, which lasted for about three hours; so far as I know, he was unacquainted with my professional character; I did not come to a positive conclusion from the examination

The People v. Thurston.

made at that interview, but I left him with the impression that he was a man of unsound mind, and that his mental state was such that he was liable to break out at any time in impulsive acts of violence, or other extravagance; his appearance on that occasion, certainly gave rise to the thought in my mind, that he might attempt personal violence to myself, so much so that I calculated the consequences of a struggle a little. I have observed the appearance of the defendant during the trial; believe I have heard all the evidence given here in his case; from what I saw of him in the jail, and from all the evidence given in the case, bearing upon the subject of the state of his mind at the time of the act for which he is on trial, I think he was then insane.

I came to that conclusion in this way: taking the history of the case in the order of time, I first consider the hereditary predisposition and then the history of the bodily health of the individual from an early period in his life down to the time of the act; in these I see sufficient cause for mental derangement; then taking his mental history into consideration I think I perceive the existence of mental derangement; causes and their usual effects serve to corroborate each other. My impression is, that he has been a man of unsound mind for some years, and that there has been that particular susceptibility which under circumstances of anxiety and excitement, especially if occurring in a more than usually deranged state of bodily health, rendered him liable to have sudden outbreaks of an extraordinary character, and of such a kind as would most naturally arise from the train of events which at the time led to the impulsive act; I think his mind is now unsound; I mean that he does not possess the usual integrity of the mental powers; I turned my attention at the interview in the jail to ascertain whether he simulated insanity; his physical appearance was consistent with the history he gave me of his health, the general correctness of which has been corroborated by the evidence given here. I was forcibly impressed with the appearance of his eyes; there was not only that indescribable

The People v. Thurston.

appearance which I have often seen in such cases, but a great, sudden and rapid dilation and contraction of the pupils, and sometime one pupil dilated or contracted more than the other; these are phenomena that can not be feigned, and indicate disease of the brain.

Cross-examined.—I saw some extravagances, but discovered no positive delusions or hallucinations; did not think he had mania; insanity is the generic term; mania is usually applied by professional men to designate derangement of a pretty active kind; did not discover that Thurston had monomania; a man may have delusions and not be a monomaniac; monomaniacs have but one delusion or at most a single class of delusions; I think there has been very considerable physical derangement in this case, but it has not been of that obvious character we see exhibited in fevers for instance; the constitutional derangement was confined mostly to the nervous system; to my mind in every case, and especially in this, the truth of an in any degree suspectedly fictitious physical history, is confirmed, when followed by such a form of mental disturbance as might be expected to grow out of it, and on the other hand a train of physical circumstances being first proved, the existence of a supposed mental disease, is confirmed, when it is such as might be expected to grow out of such causes; in short, causes and effects, when either or both are obscure, throw great light on each other. Causes of disease of the nervous system have been shown in masturbation, piles, costiveness, irregularity both in eating and sleeping; and the actual existence of nervous disease affecting the mind, has been indicated by periods of great depression of spirits accompanied by pain in the head alternating with frivolity of every kind, of greater or less mental obliviousness, of statue-like standing, irregularity in attending to business, and by the fatal act itself; the statue-like standing has been spoken of by several persons, more particularly by the mother and the sister, Mrs. Ransom; I concur with Dr. Benedict that no one symptom which all his case exhibits, is sufficient of itself to prove the existence of insanity, nor do I think as I stated in my direct examination, that an interview

The People v. Thurston.

of three hours was sufficient to lead me to the conclusion that he was insane; I said I left him at the close of that interview under the *impression* that he was insane; I mean by unsoundness of mind in this case, that there is that state of mind in which he would be liable to be led to the exhibition of decided symptoms of insanity from extraordinary exciting causes, such for instance as great and pressing anxiety, occurring when there was a little more derangement of bodily health than usual; I would expect a sudden outbreak of violence in this case, because such an event would be a legitimate one in its natural history; his history and present appearance make a stronger impression upon me, because they are consistent with each other; I have had it in view all the time that this might be a feigned case, or that a fictitious case might be framed by the defence; but I do not think it possible, no matter how intelligent or experienced might be the person attempting it, for any one to make up a case whose natural history from beginning to end, whose phenomena as compared with other undoubted cases that are familiar to all practical men, should be so consistent, each part, with every other, and so perfect as a whole; I would not have gone away from that interview and given a certificate of insanity, but I was under the pretty strong impression, when I left, that he was a deranged man; do not know that the narrative he gave me was in itself irrational, though there was a great deal of impertinent digression running through it; I had no other knowledge of the truth of the narrative he gave me than such as was afforded by the narrative itself; the narrative he gave me in regard to the state of his body and mind, contained a series of events which naturally followed each other and led to the conclusion that he was insane; it had its consecutive stages, like the growing up of an individual in his several stages of development; it would be easy for a man to make up a case to his own liking, but not, I think, one of this kind that would deceive me; he went into quite a full history of his life; I propounded inquiries to him and took him backwards and forwards; he told me of occurrences in his life that would be likely to trouble him; did

The People v. Thurston.

not mention any difficulty with his cousin; he intimated to me that he had been disappointed in his affections, but did not give particulars; he mentioned an instance of personal violence occurring some years ago; he mentioned the subject of his general temper and was under the impression that it was rather quick; he made an expression something like this, that he "frequently did things that he afterwards did not see why he wanted to do them;" also gave me to understand that he was a man of more than ordinary generous impulses; he gave an account of this particular act (the killing); mentioned the circumstance of his being kept awake nights in drying the plastering of his house, in connection with inquiries I made about his habits of sleep during all his life time; I think the tendency in his case is to dementia; these sudden outbreaks are common in a class of cases, to which I suppose this to belong; there was not only great restlessness (which he might have feigned), but his physical appearance and the expression of countenance, I thought he could not feign; expression of the eye varies in different forms of insanity. From his reading and from his apparent comprehension of the subjects upon which he has read and from the appearance of his head, I think he is a young man of more than ordinary native intellectual powers, but I think it must strike any intelligent observer as it does me, that he is childish in his whole conduct, that he is, as the colored woman first examined expressed herself, "foolish;" his whole history shows to me a good natural mind, considerably reduced in its best state of late, in force and energy. This man's conduct in carrying on his business is to me an evidence both of a right mind and wrong mind; think it a pretty rare exception to the rule that an insane man should carry on his business for years. Insane persons sometimes contract marriage; marriage is sometimes the first evidence of insanity; ordinarily there is no difficulty in discovering insanity when it exists.

Question.—Is there any means by which the tribunals of our country can administer justice, if the outbreak itself which strikes down a fellow man, is the first evidence of insanity?

The People v. Thurston.

Answer.--There is a means which is generally practiced in this country, and is being practiced in this particular case. In France and under some other of the European governments, it is customary to submit doubtful cases to a commission of experienced medical men, who examine the case as long as they desire to, sometimes for months, and when they have satisfied themselves in regard to its nature, report to their proper tribunal accordingly. I see an evidence of insanity in the act itself and in the circumstances immediately following it; have reference to his not denying the act, to his manner as testified to by his mother, his expression of countenance, his statue-like standing, the repeated efforts necessary to excite his attention; these several peculiarities are neither of them decisive, each is perhaps trifling in itself, and yet they are events in keeping with the usual history of such cases and do not usually occur in ordinary murders. Taking him to be a sane man, I think his standing as described is singular. To deny the act when so many persons were present, would not necessarily indicate insanity; I think all recorded cases have exhibited some premonitory symptoms before the violent outbreaks.

Direct resumed.—I think premonitory symptoms might exist without their being observed. In the jail he did not speak of having any knowledge of this deed. Neglect of his business does not in itself indicate insanity, but in this case, taken in connection with the manner in which he spent his time when he neglected his business, and the condition of mind and body he was in at such times; these circumstances put together show to my understanding that his carrying on his business gave evidence both of a right mind and a wrong mind.

Dr. L. H. Allen, sworn: I visited Thurston in prison with Dr. Butler; had not visited him there before; have enjoyed no opportunities, other than those that have risen in my own practice, to judge of the insane; I have seen insane patients; from what I saw of this man, his appearance, &c., I am led to the conclusion, taken as a whole, that he is a man of unsound mind; I agree in all the general views with the other Doctors who have spoken.

The People v. Thurston.

Cross-examined.—I can not say when I reached the conclusion first, that he was a man of unsound mind, but the possibility and probability that he might be insane, were suggested to my mind immediately after the testimony was out at the coroner's inquest, but my mind was held in suspense, I did not know but there might be further development; I have said, I think, that I thought he was insane; I do not know whether I ever conversed with Mr. and Mrs. Jones upon the subject; there may have been some conversation with them about it, but I do not recollect any, nor with Mr. Huntington, nor with Mr. Williams; I never have stated to anybody, or at least never intended to state, that I thought he was not insane, and I say now that if any person ever drew that inference, that he did it without any authority of mine; I can not say when I first came to the conclusion that he was a man of unsound mind; I have reached this conclusion now on the stand; when I heard the testimony on this trial, I had my impressions confirmed; after the testimony before the coroner, the thought suggested itself to my mind in view of the various forms of insanity, that that man might have committed the act under momentary insanity; there was nothing published in that evidence about insanity; I made up my mind from the circumstances attending it; I mean by unsound mind, where any of the intellectual or moral faculties are disturbed in the absence of fever, or introduction of any foreign substance into the system that would produce insanity. I concur with the gentlemen preceding me, that his state is one of approaching dementia. I am the administrator of Garrison with the widow.

Prentice Ransom, re-called: The first time that I can now recall to my mind distinctly that Thurston spoke to me about the difficulties between his sister and her husband, was about five years ago.

Here the testimony closed on the part of the defence.

The following witnesses were then called by the prosecution and being sworn, testified as follows:

Gideon O. Chase, sworn: I reside in Owego; have lived here about nineteen years; I have carried on here no mechanical

The People *v.* Thurston.

business though I have worked at cabinet making; have known Thurston ever since I have been in Owego; never had much dealing with him; only worked with him in the shop; that was sometime between 1835 and 1842; have been with him a good deal ever since I have known him; have had frequent conversations with him; can not fix the time of the last conversation with him.

Question.—During all your intercourse with him have you ever supposed he was deranged?

Mr. Dickinson objected, saying—that is a matter to be judged of by an expert. We object to taking testimony on that subject from any but experts. We do not object to witnesses stating particular acts, or what the prisoner did and said, but to their stating whether or not they thought him sane we object.

The court said that they did not understand the question to be objectionable, but thought it might be varied in language.

The question was then restated: Have you ever seen any thing singular or improper, or different from other men in his conversation or intercourse?

The counsel for the prisoner continued the objection to that form of the question.

The court ruled it admissible, the counsel for the prisoner excepted and the witness replied—I never did.

Cross-examined.—He appears different now from what I am in the habit of seeing other men out of doors; I think his complexion is different; I fancied the other day when I saw him here that I saw a difference about his eyes, and I so remarked to the gentleman who was sitting by me; I thought he looked more wild than he did formerly; he lived some three or four doors from my hotel; in February last my hotel was about as public probably as any of the hotels; the whole street is one of the most public places in the village; persons are constantly passing from the hotel to the depot; my hotel is on the same side as his house; there are shops across the street from it, and other houses join close up to his, and another family was living in a part of his house at the time of the deed.

The People v. Thurston.

Dwight Hazzard was called for the prosecution and sworn and testified as follows: I reside in Canawana; have resided here; have known Thurston, the defendant, some 13 years; am a cabinet maker; worked in the shop with him somewhere about 1840; have been with him at times almost every day; have boarded with him at the same house something less than a year.

Question.—In all your intercourse with Thurston, have you ever seen in him any thing indicative of a deranged mind in any way.

The counsel for the prisoner objected to the question, on the ground that the witness was not a medical man or an expert.

The question was ruled admissible by the court, the counsel for the prisoner excepted, and the witness answered—I have not.

Cross-examined. I have known him to be unwell; I have known him to have a cold; have heard him complain of the piles of late years, but not of costiveness; have known him complain of headache; have seen him down-hearted, but not frequently; he was rather peculiar in some respects, but in these fits was not different from other men, his mind was a little different from other men in regard to his political and religious opinions.

Chauncy Hungerford, sworn: I reside in Owego; my business is that of carpenter and joiner; have worked in the shop with Thurston a part of two winters, three and four years ago; have known him between seven and eight years; have had business with him several times; have bought of and sold to him different things; have been on intimate terms of social intercourse with him; have never seen any thing in him as a man of business, strange or unusual; he was peculiar in politics and religion; his opinions were different from mine; he maintained his positions strongly, and was very good in argument, I thought; have often heard him discussing these subjects, and in his manner and conversation never discovered any thing strange.

Cross-examined.—I mean by intimate terms of social intercourse, that when I have met him I have spoken with him and conversed; I have never discovered that the structure of his

The People v. Thurston.

mind was peculiar; never thought any thing about it; have heard of his being unwell; have heard him complain of headache; he was pretty generally at his business; I never thought he was unusually afflicted with low spirits; sometimes he got out of patience with me; I called it pouting, growing out of some trivial matter.

Warren Reeves, sworn: I reside in this village; have resided here since my birth; am aged twenty-five; have known John M. Thurston always by sight, more particularly the last two years; I have done business with him; he has been a subscriber to my newspapers; I have never conversed with him only on business; in all my intercourse with him I never knew of any thing strange, singular or unusual in him; never thought of any thing of the kind.

Cross-examined.—I have met him and spoken with him in the street; within the last two years all the knowledge I have had of him is, he took my paper and called at the office to get it.

Abram B. Elston, sworn: Have worked with him; very little, for him in the same shop; have seen him nearly daily; in all I have known of him, I have never known him to be very singular.

Cross-examined.—I think his mind was like that of other men; don't know that I saw any thing different from other men; I think he was eccentric to some extent.

Direct resumed.—I mean by eccentricity, that he was more than usually engaged about free soil and abolition.

Ralph Hibbard, sworn: I reside in Owego; been here twenty-five years; have known Thurston ten years; I think I knew him when I met him in the street, that is pretty much all; am a cabinet maker; have talked with him sometimes about business, sometimes concerning the trade, the price of work or the price of lumber; don't know as I ever saw any thing singular, strange or peculiar about him.

Cross-examined.—I have not had as much intercourse with him as with my neighbors generally; I never knew any thing about his ill turns.

The People v. Thurston.

John Searles, sworn and testified: I reside near the depot in Owego; keep a livery stable; first knew Thurston ten years ago, barely got acquainted with him then, and did not see him again till about six years ago; have known him for the past six years; have had dealings with him occasionally; have conversed with him often. In some things I have thought he was singular, I have thought he did not have as many associates as young men generally have; lived more by himself and more secluded; never saw any thing peculiar in respect to his mind; the thought never occurred to me.

John W. Turner, sworn: I am a cabinet maker of this village; have known Thurston four or five years; have worked for him very nearly two; boarded with him; was working for him at the time he was involved in this difficulty; have bought some of his wares; have conversed with him some considerable; he commenced the repair of his house about the last of January of this year; he had usually not more than four of us. I have seen things in him different from my neighbors in general; I have seen the turns that have been spoken of once in three or four weeks. They were a kind of despondent turns; he would not do much of any thing, sometimes they would last a week; sometimes three or four days. He generally made his purchases and sales himself, and continued to do so as long as he continued his business. I have seen nothing else but these spells; they came on suddenly, sometimes with a headache.

Cross-examined.—I think he had one of these turns a day or two before this occurrence; they would come on in this way; he would be sitting in the shop, perhaps, in earnest conversation, and all of a sudden he would make some odd expression, then he would stare around, then he would start up and make another odd expression, sometimes it would be, "Well, there, by God," or "Who the devil would have thought of that?" The day before the occurrence I was sick, and confined to my house most of the day; and the day before that, he commenced one of his odd turns; I mentioned it to my family; he worked in the shop during the last week, though not steadily; I think

The People v. Thurston.

he only attended to his sales. He was repairing his house; he bossed his house as we call it.

Edward J. Johnson, sworn: I have known Mr. Thurston more or less for eight or ten years; have dealt with him some six or seven years; my business is blacksmithing; my shop is across the street from his; have had a good deal of conversation with him down to about the time he was married; I thought he was rather eccentric; though he had a pretty clear mind, I thought there was a peculiar cast to it; that it run in a particular way. His views in regard to crimes were different from those of most people; he thought it more criminal for a man to vote for a slaveholder or a rum seller than it would be to shoot him. I recollect being in his shop one time, when he wanted to settle with me; proposed to jump accounts, or something of that sort, and said he was not going to live long, and complained of being unwell; that was the summer or fall before this affair, and before he was married; he appeared better the next time I saw him, and did not say any thing more about it. I never thought of his being deranged; have heard him argue, and have argued with him; thought his mind was clear; he maintained an argument well, but carried it to extremes.

Mrs. Emily Allen, sworn: I have resided in Owego seventeen years; know Mr. Thurston some, but little; remember the night of this occurrence; was in the house of Mr. Dodd about seven o'clock, half an hour, I should think, before the occurrence; first heard of the occurrence in the conference room of the Baptist church; saw Thurston that evening; saw him first at Mr. Dodd's house; I was there on business and just coming out of the door; Miss Dodd came out with me; we were standing on the steps as Thurston passed, I thought he had a small tin pail in his hand; he passed me and simply bowed. Miss Dodd said, "Did you know Thurston was married?" Hearing the church bell ring, I hurried on to be at the church in season, and overtook Thurston; a word or two passed between us; I said, "I believe you are married," and asked him how he enjoyed keeping house; he replied, "very well." We got to his gate, he passed in and I went along; I did not notice but

The People v. Thurston.

he was in a pleasant mood. Miss Jane Dodd said he got milk above there.

Cross-examined.—This interview was entirely casual.

Isaac B. Ogden, sworn: My cabinet shop is on Main street in this village, near the Post Office; have known Thurston some twelve or fifteen years; he has worked for me and I have talked with him frequently; have seen him sometimes three or four times a day; sometimes not for a week; could not say that I have seen anything singular, strange, peculiar or erratic.

Cross-examined.—Each of us had shops in town and sold wares pretty near each other.

James Hill, sworn: I reside the next house north of Thurston; have known him fourteen or fifteen years; have dealt with him some but not a great deal; have some acquaintance with him though perhaps not so much as with others of my neighbors; was not much acquainted with him; I never saw anything singular, strange or peculiar in him.

Chester Dana, sworn: Am a house painter in this village; have known Thurston twenty-five years; never had dealings with him; have had very little conversation with him; lived eighty rods from him, I should think; have worked in the shop of Mr. Ogden with him, he at cabinet making, I at painting; I have worked there twenty years; he a number of months, I should think less than a year; I have met him often; saw him almost every day; I have never known anything singular, strange or erratic in his mind that would lead me to think he was insane.

Cross-examined.—We worked in separate rooms of the shop, though on the same floor.

Edward G. Gibson, sworn: I have lived here fifteen years, and have known Thurston during the whole time; never dealt with him; have had conversation with him; lived within eighty rods of him; it never has occurred to me that he was insane; I have known him as the head of a shop carrying on his business.

Cross-examined.—The population of Owego is between two and three thousand; it was about two years ago the cars com-

The People v. Thurston.

menced running through this village; the railroad company was actively engaged in making the road through the village one or two years before that; since the railroad has been completed, there has been a greater influx of strangers than before, giving more life and activity to business, and less opportunity of noticing my neighbors than before; for the last five or six years I have not met Thurston very frequently; we were together more before that time; if he had had peculiarities I might not have known it.

Direct resumed.—I have not given up my old acquaintances because new ones have come in.

Franklin Slosson, sworn: I am a merchant; have resided here thirteen years; have known Thurston during that time; in all my intercourse, I have never noticed anything singular, strange or peculiar in him; I have known him as a business man, as the head of a mechanic shop; I saw him on the same evening of this affair go down from his shop and turn towards his house with a lighted candle in his hand.

Question.—Did he ever complain to you of pecuniary embarrassment?

Mr. Dickinson objected. That is a new branch of the case and irrelevant to it. The court overruled the objection and the witness replied—"He did not complain of embarrassment, though he spoke of business matters."

I am trustee of a school district here; he owned a lot near the school house and was anxious to sell the back end of it to the school district so he could pay up what he owed on it; I had a small bill against him; I presented it and he said he had considerable difficulty with his wife's partnership just then, and could not pay the bill.

Charles R. Coburn, sworn: I have resided in this village sixteen or seventeen years, and have known Thurston the whole time; he was a pupil in my school when he was a boy; I have known him since that period; have had the same intercourse with him as with other neighbors living as far from him; I live between one-half and one-fourth of a mile from him; in all my intercourse with him I have never seen anything strange

The People v. Thurston.

or singular about him; some two years ago I heard him speak on two occasions in debating clubs.

Frederick Parmele, sworn: Am a carriage maker in this village; have known Thurston some five or six years; have dealt with him quite a number of times; have lived right across the street from him; during all my intercourse with him, I have never seen in him anything singular or peculiar; I have given more orders to other people who would go and trade with him on my account than I have traded with him myself; he never has been in my family much.

Romeo Woodford, sworn: I have resided in Owego some thirteen years; am carrying on the hardware business and tin manufacture; have known Thurston ever since I have lived here; have dealt with him since 1842 more or less each year; he made his purchases himself; I have purchased of him; his habits as a purchaser were good; I have never known anything in him extraordinary, erratic, or different from my neighbors.

Cross-examined.—He may have had fits of illness and melancholy and I not know it.

Benjamin R. Sturges, sworn: I have known Thurston two years; have had dealings with him; I saw him some four or five hours previous to this catastrophe; he was at my carpenter shop to do business with a couple of men making bedsteads for him; he gave his directions about the style, &c. At that time I noticed that he was in great haste and desired to get through his business as soon as possible; I think he said he was in a hurry to go to Mr. Camp's; I saw no more than this anxiety to get through as soon as possible; I have frequently noticed him as a man of business; he always hurried it through as quick as he could, but did it regularly and promptly as far as I knew.

Cross-examined.—My acquaintance with him has been very casual; I did not notice his manner so much when he was at my shop just before as I did after this murder; then my mind immediately recurred back to his appearance; I thought he appeared more anxious than I had ever seen him before; after

The People v. Thurston.

I knew of it, then it struck me there was something very peculiar in his conduct in my shop.

Thomas Dodd, sworn: Have resided in Owego twenty years; have known Thurston ever since I remember any one; have grown up here with him; have never done any business with him; have not often been in his shop; have had no conversation with him of late years; we had a little difficulty a few years ago; I do not know as I have ever discovered in him anything singular, strange or peculiar.

Cross-examined.—Did not know of his fits of illness and do not know as I should have known if he had them.

Abram T. Hyde, sworn: Have resided in Owego seventeen or eighteen years; my place of business for fourteen months was next door to his shop; have met him and conversed with him often; was in and out of his shop occasionally; I found him sometimes at work at the bench, sometimes selling furniture; in all my acquaintance with him, saw nothing singular, strange or peculiar.

Cross-examined.—I associate most with neighbors living nearest to me, and in proportion as they recede from me my associations are less frequent.

Charles Ogden, sworn: I am a gunsmith in Owego; my shop is a few rods below Thurston's; I have known him for a number of years, quite intimately, though more so when we were young than for the last few years; I was often in his shop and he in mine; I have not at any time seen anything singular, strange or erratic in him.

Cross-examined.—Did not know anything of his private habits.

William P. Raymond, sworn: I reside in Owego, some four or five rods from Thurston's place of business; have known him twelve years last July; have kept the Tioga House five years, and the next four years I was justice of the peace and my office was directly opposite the Tioga House; I have met Thurston frequently during this long acquaintance; I have not dealt with him extensively, but have had small deals with him, such as neighbors have; I do not know that in all my acquaint-

The People v. Thurston.

ance with him, I have ever seen anything in him of a strange, singular, erratic or peculiar character, nor anything differing from other men of business in town.

Cross-examined.—I never knew of his having his turns of illness; never took any more notice of him than I did of any other neighbor.

R. D. Willard, sworn: I have been the keeper of the jail since Thurston has been in it; he has not attended to business much, but he has been called on to attend to business; he has assisted his brother in settling up his own accounts; his brother has been in a good many times; business matters have been talked over; memorandums made and handed back and forth; this continued from four to five weeks; his appetite has not been regular; sometimes in taking his food he would say he did not feel like eating anything; I do not know his habits of sleep; he never has complained about that; he has not been in the habit of conversing much with me; his appetite has been more irregular than that of prisoners generally under my keeping; it was more unequal; he never ate excessively.

Cross-examined.—He has complained of having headaches; has had physicians three or four times; if he was sleepless, I should not be very apt to know it.

Charles T. Bell, sworn: I lived in part of Thurston's house two years; moved from there last May; it was adjoining Thurston's shop; I have had very little dealing with him aside from renting his house; we were in the habit of using the same back yard, and have met him there frequently; I considered that he was pretty ultra in his political and religious views; thought he went to extremes sometimes; he would maintain his viws by argument; this is all I ever saw in him singular, strange or peculiar.

Cross-examined.—I have known one or two in this place, although I never conversed with them, who were as peculiar and ultra as he is; I never thought of there being anything peculiar in the operations of his mind; he was singular only in the extent to which he carried his opinions; he discussed them a good deal; I have never known anything about his health; I

The People v. Thurston.

have known of his being unwell; I did not know enough of his private habits to know when he was unwell; I had noticed that he was sometimes not as cheerful as at others.

Doct. Hiram N. Eastman was called by the prosecutor, sworn and testified: I am a physician and surgeon, and have practiced in this village nearly twelve years; I have known Thurston perhaps ten or eleven years; I have met him frequently during this period and am well acquainted with him; I have never visited him as a patient; have seen him but once in prison — that was last Saturday night with Doctor Allen; before the catastrophe I had never seen anything in my intercourse with him indicative of derangement; in fact I never thought of it; I conversed with him, with Dr. Allen, in the prison about an hour; the time of conversation was mostly occupied by himself; I asked him a few questions; I have formed an opinion of his case; in the first place I would say his appearance was that of a sufferer from extreme mental anxiety, and in connection with that there was an imbecility of manner, some wandering, some forgetfulness, some hesitation in his narration at times; he talked enough to give me an understanding of his case; I have heard the most of this case; I have heard most of the defence — not all.

The counsel for the defendant objected to the witness giving an opinion unless he had heard all the evidence.

I have generally not been able to be here in the morning as soon as the court came in; sometimes for an hour; and I have been called out once or twice; some of the evidence that I did not hear I have read; but there are portions which I have neither heard nor read; I did not hear all of Miss Nancy Thurston's nor all of old Mrs. Thurston's testimony; I can't tell which portion of old Mrs. Thurston's testimony I did not hear, nor which counsel was examining; I was listening with one ear and reading a paper when I heard what I did hear of old Mrs. Thurston's evidence; I can not say that I heard the whole of Mrs. Ransom's.

The counsel for the people then asked the witness, "From

The People v. Thurston.

what you have heard of the case, and what you have read of it, and what you know of it, what are your views of it?"

To this question and the evidence called for under it the counsel for the defendant objected, on the ground that the witness had not heard the whole of the evidence, and that it was not competent for the witness to give an opinion upon the evidence as to the prisoner's mental state at the time of the act without having heard the whole of the evidence. The court overruled the objection, to which decision of the court, the counsel for the prisoner then and thereupon excepted.

Witness.—I would simply say, that from the evidence I have heard on both sides and from my personal acquaintance with the man, and from what I have seen of him since his arrest, that there has not been sufficient evidence, to my mind, to show an insane impulse; I do not say there is no obscurity in this case; I have sometimes vacillated in my opinion, but on the whole, taking my previous knowledge of the man, somewhat eccentric as he is and rather ultra in his views, an impulsive man, a man governed rather by impulse perhaps, than by cool deliberation, I incline to consider the issue as not a long premeditated matter, but brought about by excitement at the moment; I would not say temper, I mean excitement in a broader sense than that. The circumstances seem to indicate that he must, for a few days before this, have been under a state of great excitement; and allowing that he was honest in the endeavor to restrain that excitement as any one should, the excitement increasing when the father came for the child, it produced a sort of bursting out of an excitement, perhaps of a mingled character; I don't think it was what might be called maniacal excitement, but it was something like the excitement of anger or revenge when the temptation was strong, or in other words, there was not an entire want of the controlling power of the will. His speaking just after the act, of his sister having been abused the night before, seems to me to show a sufficient motive.

Dickinson.—The witness is not to speak of motives.

Witness.—I have never known a case like it. There are

certain external indications of insanity which the popular mind will detect as well as a physician; when the public fail to detect, the case is an exception as a general rule; I consider the prisoner in a feeble state of mind now; his conversation was somewhat forgetful; he would now and then make a rather weak, childish remark; he is in rather an enfeebled, imbecile state of mind; he talked most of the time and in rather a slow way.

Cross-examined.—I have enjoyed no more opportunities than most medical men, in the ordinary practice of their profession, to judge of insanity; I have treated a few cases, though no more than medical practitioners generally; I have refreshed myself by reading, since the occurrence of this case, though I don't know as I have found any new ideas; medical men, men of great experience, if they have good judgment, and those having charge of thousands of insane patients, are the best judges of insanity; I would as a general thing yield my own opinion to medical gentlemen of experience with thousands of insane patients; I do not say I would yield my own opinion to that of any man when I was satisfied such opinion was wrong; I believe a man of experience would be better qualified to judge than myself.

Question.—Can a competent knowledge be acquired or enough in your judgment to speak of it with much safety without a large experience?

Answer.—Certainly, all other things being equal, a man of great experience is the best judge; I have had two cases of insanity in this village; I consider insanity a generic term; one of the cases would come under the term of mania; I have been called in occasionally to see a third one; two of them I attended as the principal physician for several months; they were very marked cases; one was carried to the Asylum, and the other prepared to go but finally got better and was not carried; one other case I now recollect some years ago that passed out of my hands into the care of another physician; and another still, occurs to my mind, and that was a case of insanity founded on hysteria; none of these case were the result

The People v. Thurston.

of masturbation, as they were all females and married women; one, the worst case, was immediately after confinement; one arose from extreme nervous irritation, and the third was an extreme case of neuralgia, followed by hysterical mania in its worst forms. Insanity supervenes more frequently where there has been insanity in the ancestors on one side and more readily still when both sides were thus afflicted.

Question by Mr. Dickinson.—Let us suppose a case; suppose the case of a person now about thirty years of age, of a sensitive and nervous temperament, that the family of his father and also that of his mother, have been afflicted with insanity in numerous cases; that 15 years since he was in the habit of masturbation, practicing it frequently, almost daily; that 10 years since, 9 years since, 4 years since and 2 years since, he is proved to have continued the same vicious practice; that about 1845, he changed for about one year his habits and custom from being steady and industrious to negligence and inattention, so much so as to alarm his friends, working very little and then very immoderately; his habits of dress and attention to his person from neat and tasteful to careless and slovenly, and occasionally indulging in extravagant dress, and conversing on the subject in a frivolous manner. That he should be sad, gloomy and dejected; be afflicted with obstinate costiveness of a week's duration, accompanied by great distress and agony in the head, and followed by piles and diarrhea; that he should at times stand fixed and motionless; his eyes glare wildly; be sleepless; eating irregularly, sometimes abstaining from food an entire day, and then eating excessively; sometimes pale, at other times flushed; that after the expiration of about a year, he should return to his business and former habits, but should be afflicted with fits of depression, usually intervening from three to five weeks and continuing from three days to a week, and frequently longer, up to February last, during which he would be sleepless with great agony in his head; eyes glassy at times; sad and gloomy by turns; inclined to wander alone; to stand in a fixed posture and gaze vacantly; to eat irregularly; with costiveness as before

The People v. Thurston.

stated; with piles and diarrhea intervening; that these fits increased in length and intensity as time progressed; one in January, 1851, being so marked that the person's eyes were wild and glaring, great distress in his head; sleepless with all his usual symptoms in such cases upon him; tossing his head in agony and presenting such an appearance as to cause his mother and sisters to believe him crazy, and to speak of it at the time; that four weeks afterwards he should have another fit of depression commencing; should be engaged late at night for several successive nights in keeping warm a newly plastered room and should thereby be deprived of his usual sleep; that a near and dear friend should be at his own house with his wife, mother and sister, and he should without any adequate cause or provocation, or any warning, seize an axe and kill him suddenly, should give himself up to justice and then at this time should present such an appearance as this person does, what would you say was his condition at the time of the commission of the act?

Witness.—I should say that he was insane; such a case as you have pictured, I should not doubt being one of insanity; would say in justice to myself, however, that, although many of those circumstances which you have supposed are found in this case, still I have not understood this to be a parallel case; no one of these symptoms necessarily prove a man insane; I think masturbation is one very important and general cause of insanity; in some cases it would be one of the first causes; in some it would be one of the last, according to circumstances; costiveness and piles would be other exciting causes; oftentimes these causes do exist without insanity; I have never known a case of sudden outbreak without strong indications of it previously in some form; despondency is one of the premonitory symptoms of insanity; I do not know that I have ever seen a case of decided impulsive insanity; what I consider to be an impulsive act, is a strange, outrageous act, without any motive, where the will is overcome by a blind impulse, to acts of violence; his language gave evidence of imbecility; his mind I think is naturally strong; imbecility would hardly be in-

The People v. Thurston.

sanity; though it might end in dementia; it is a suspicious circumstance; his conversation was somewhat disconnected; now and then a little wandering from the subject; just like any other disease, one symptom alone proves nothing or very little; but taken in connection with the whole history of the case, it proves a great deal; I am not clear about the case but taking all the circumstances into consideration as I have viewed the testimony, the evidences of absolute insanity, what I consider insanity, were not sufficient to produce the conviction in my mind that it was a case of impulsive insanity; but, still, my mind is not clear the other way; I regard costiveness, piles, headache, &c., as symptoms of insanity, and they should be watched with exceeding care; but at the same time, that same state of things does exist in other persons, producing ungovernable passion, that after all I would not consider insanity. This state of the bowels may be an effect of a diseased brain or the cause may be something else; I think the great majority of persons get over it without arriving at insanity; we have a diseased brain from constipated bowels and constipated bowels from a diseased brain. Hereditary predisposition to insanity may naturally lead to masturbation; though because my grandmother or father, for example, was insane, I do not suppose that that would produce the habit of masturbation in me.

After the argument of counsel, and a charge from the presiding judge, the cause was submitted to the jury, who found the prisoner guilty of murder.

A bill of exceptions having been settled and signed, a certificate was granted by Justice Monson as follows:

Tioga Oyer and Terminer.

The People vs. John M. Thurston.	}	I, Levinus Monson, a justice of the Supreme Court, who tried this action as presiding judge of said court of Oyer and Terminer, do certify that in my opinion there is so much doubt as to render it expedient to take the judgment of the Supreme Court upon the within bill of exceptions. Dated October 20th, 1851.
--	---	--

LEVINUS MONSON, *Justice Supreme Court.*

D. S. Dickinson, for the prisoner.

I. The challenge to the array by the counsel for the prisoner was well taken. The clerk did not "*draw the number specified in such order, in addition to the number of thirty-six.*" The challenge was therefore improperly overruled, and the objection appearing upon the record is fatal. (2 *Rev. Stat.* 513, § 41, 42; 7 *Wend.* 427.)

II. The two questions addressed by the counsel for the prosecution to Nancy Thurston, a witness called by the counsel for the prisoner, were each clearly objectionable, and were erroneously admitted by the court. The *first* sought to charge the prisoner with immoral conduct in a distinct matter; the second to prove it by hearsay.

III. The testimony of Gideon O. Chase, and of Dwight Hazzard, was erroneously admitted. Neither witness, as is shown, were experts, and yet each was permitted to give his opinion of the prisoner's mental condition, without stating a single fact or circumstance upon which it was founded. This is against the doctrine of all the adjudged cases and elementary writers. (*Culver v. Haslam*, 7 *Barbour*, 314; 1 *Greenleaf*, 594; 1 *Phillips*, 227; *Norman v. Wells*, 17 *Wendell*, 162; *Sears v. Shafer*, 1 *Barbour*, 411; *Jefferson Insurance Co. v. Cotheal*, 7 *Wendell*, 78; *Morehouse v. Mathews*, 20 *Comstock*, 514; *Palmer v. Conly*, 4 *Denio*, 374; 9 *Mass.* 225; 8 *id.* 371; 4 *Cowen*, 203.)

IV. The testimony of Dr. Hiram N. Eastman, the only professional witness called by the prosecution to prove the prisoner sane, was erroneously admitted.

This witness was permitted to give his opinion as an expert, upon "*what he had heard of the case, and what he had read of it, and what he knew of it,*" though he stated in advance that he had neither heard or read the testimony of some witnesses whose statements were principally relied on by the counsel for the prisoner to prove him insane. If there are no adjudged cases bearing directly upon this point, it is because so flagrant a violation of the law of evidence was never before attempted.

The following cases show that those who are permitted to

The People v. Thurston.

give their opinion of the prisoner's mental condition from the testimony of others should be present and hear the whole evidence. (*McNaughten's Case*, *Harrison's Digest*, vol. 5, 444; 10 *Clark and Finnely*, 200; *King v. Searle*, *Harrison's Digest*, vol. 2, 2276; 1 *Moody and Robinson*, 75; 8 *Scott's New Rep.* 595; *Rex. v. Wright*, *Russell and Ryan's Crown Cases*, 456.)

A. Munger, (District Attorney,) for the people.

As to objection made to caption of indictment, that there is no such officer as "Justice of the Peace in and for the county of Tioga." Caption not necessary, and no part of indictment. (3 *Cow.* 322.)

The constitutional designation is "Justice of the Peace." (*Art. 4, § 7, Constitution.*)

They are designated as Justices of the Peace in each county, for the Sessions. (*Judiciary Act*, § 40; 3 *R. S.* 677).

Justices are strictly justices for the county in all respects except in trial of civil causes. (9 *Wend.* 320.)

In the act relative to religious meetings, they are expressly called "*Justices of the Peace of the county.*" (1 *R. S.* 847.)

The additional words are, at most, surplusage.

As to the drawing the twenty-four additional jurors.

Jurors in criminal cases drawn same as in civil. (2 *R. S.* 819.)

The clerk from the new ballots draws the number of names required, and has no authority to draw any more names, except in case of *known insanity, death or removal*, of a person whose name is drawn. (3 *R. S.* 510.)

No injury has arisen to the defendant, as the panel was not exhausted at the trial.

The prosecution asked Miss Nancy Thurston whether she *knew* that prisoner was charged with *seduction*, or how or whether she had heard of his being charged with it.

Much evidence had been given to show irregularity in prisoner's conduct, sleeplessness, depression of spirits, &c., in 1845.

It was shown that he became that year unluckily attached to

The People v. Thurston.

a young lady. This attachment troubled him, we wish to show why this attachment troubled him, and also that charges made against him were sufficient to account wholly, or in part, for his irregularity.

The prosecution asked witness Chase, if he had seen any thing singular or different from other persons in prisoner's conversation or intercourse.

The objection came too late, as much evidence of the same kind had already been given. (4 *Cow.* 355.)

Defence asked, what was the strangest thing you ever saw in him?

The objection is specific, that witness should not state whether he thought prisoner insane. (1 *Wend.* 418.)

Witness, Hazard, was asked if he had ever seen any thing in prisoner, indicative of a deranged mind, in any way.

Objection that witness was not an expert or a medical man.

This is not a question for an expert. Nothing but long personal observation could furnish the answer; long acquaintance and not science was requisite. (1 *Denio*, 311.)

The question was proper from the difficulty of specification. (4 *Cow.* 355-6.)

It was merely preliminary, and designed to direct to proper points of inquiry. (1 *Starkie Ev.* 124-6, § 14.)

There is much discretion left with the court upon the examination of witnesses, and unless some established rule of law has been violated, this court will not interfere.

Dr. Eastman, a witness, who had been acquainted with prisoner many years, and had visited him recently in prison, and had heard the most part of the testimony, specifying what part he had not heard, was asked what his views were, from what he knew and had heard of the case.

Objection, that he had not heard the whole evidence.

This objection came too late, the prisoner's witnesses, Dr. Benedict and Dr. Butler, on the subject, had not heard the whole testimony. (4 *Cow.* 355.)

A like question was conceded to be correct, where witness had heard but a small part of the testimony. (4 *Denio*, 16.)

The People v. Thurston.

The grounds of his opinion were clearly stated, the question was competent; its credibility would depend upon his declared means of knowledge.

The following opinion was delivered by

CRIPPEN, J.—Nancy Thurston, a witness in behalf of the prisoner, on her cross-examination by the counsel for the people, testified that the prisoner became attached to a lady while she was staying at the house of his father, and it was reported that she became pregnant at that time and during her stay there. The counsel for the people then asked the witness, whether she did not know that the prisoner was charged with it? (the prostitution of said female.) The prisoner's counsel objected to the question. The court overruled the objection and the witness answered, she did not know it when the lady left her father's. The counsel for the people then asked the witness how long it was after she left before witness had any information about it? This question was also objected to by the prisoner's counsel; the court overruled the objection, and the witness answered, that she heard of it in a few days. This testimony was intended to, and went, to prove that the prisoner had been charged with the immorality of prostituting a female while she was an inmate in his father's house, who was a near relative of his father's present wife. I am unable to discover upon what principle the learned judge admitted the above testimony. The prisoner was on trial upon an indictment for the highest crime with which a human being can be charged; he was called upon to defend that charge and nothing more. His conduct in respect to the subject matter inquired of by the counsel for the people was foreign to the charge made against the prisoner; it had no connection therewith.

Although much latitude may be allowed in the cross-examination of witnesses, still, the witness in her direct examination had testified to nothing opening the door to the counsel for the people, to digress so far from the legitimate and important matter involved in the trial as to allow the inquiries to be

The People v. Thurston.

made of the witness, relating to specific and particular acts of immorality of the prisoner which had no connection with the main charge made against him. The general character and life of the prisoner under some circumstances might be the subject of inquiry, yet, I am not aware of any rule of evidence which authorized the prosecution to raise collateral issues upon specific charges against the moral character of the prisoner, having no connection with the crime imputed to him in the indictment.

It is not for the court to speculate upon the question whether the evidence could or did probably have any influence upon the minds of the jurors; of this the court can not judge; no human tribunal can determine with safety, or undertake to form an opinion, of the impression which the testimony made upon the jury. Its object and tendency must have been to prove to the jury that the prisoner had been a man of loose moral character, destitute of those high and noble qualities of honor and morality that always adorn the character of the upright and virtuous, and therefore the impression might be produced or fairly indulged that he would be more likely to commit the crime of murder than he otherwise would have been. It opened the door for the remarks of counsel to the jury which might make a strong impression upon their minds highly unfavorable to the prisoner.

The counsel for the prosecution insisted that the testimony was admissible on the ground that much evidence had previously been given on the part of the prisoner, tending to establish that his conduct had been marked with irregularity; that he had been depressed in spirits, uneasy and sleepless, &c., therefore, the evidence was competent, in order to prove that the prisoner's attachment to the young lady and the charge made against him of seducing her were sufficient reasons for his irregular and singular conduct.

I do not subscribe to the soundness of this proposition or think that it affords a sufficient ground for admitting the testimony, It falls far short of meeting the principal ground of objection. The direct tendency of the evidence was to establish a desti-

The People v. Thurston.

tution of moral principle on the part of the prisoner; a blot and stain upon his character; a wicked and corrupt heart, regardless of those restraints which all men of correct and just views always possess, all of which was eminently calculated to lead the jury to a conclusion that the prisoner's peculiarities, his want of rectitude and moral restraints, rendered him more likely to commit the offence charged than he otherwise would have been. In a case of so much importance, where the life of a human being is at stake, we do not feel authorized to allow any testimony to be given to the jury which is not clearly legal and proper, where it may by possibility influence the result to the detriment of the prisoner.

Without examining other important questions raised upon the trial and on the argument of the case, I am satisfied that a new trial should be granted for the reasons above stated.

Justice MASON concurred.

Justice GRAY took no part in the decision.

SHANKLAND, J., delivered the following opinion:—The motion for a new trial on the bill of exceptions, taken in this cause, has engaged the careful attention of this court for several terms, and although the court are unanimously of opinion that a new trial must be granted for errors occurring on the trial of the prisoner, we do not fully concur in placing it upon the same alleged error. A majority of my brethren concur in the opinion that it was error in the Oyer and Terminer to permit evidence to prove the prisoner to have been charged with seducing a lady who boarded at his mother's, upon the ground that it tended to prejudice him in the minds of the jury. I shall not dissent from that opinion, for the reason that I have not examined the question with sufficient care to assent or dissent. I place my opinion in favor of a new trial upon other, and to me, more satisfactory legal grounds, which I deem it proper to state somewhat at large.

The prisoner was charged with the crime of murder. The

The People v. Thurston.

defence was that the act of killing was committed while he was insane. A large number of witnesses were called and examined in his behalf, who testified to his state of health, habits, peculiar opinions, &c., during a series of years, and tending, as his counsel claimed, to prove him insane. They then called several eminent medical witnesses, who were skilled in mental diseases, and who had heard all the facts testified to by the other witnesses, and who had also seen and examined the prisoner, and asked them their opinion as to the state of the prisoner's mind at the time of the commission of the act. They gave it as their opinion that he was insane. After the prisoner's counsel had closed his case, the district attorney called as a witness, Doctor Eastman, who testified preliminarily, that he had heard most of the case, but not all of it; that he had heard some of the defendant's evidence, some he had read, and other portions he had not heard or read; that part of the time while the testimony was being given in, he was listening with one ear and reading a newspaper, when he heard what he did hear of the testimony of the mother of the prisoner. The district attorney then asked him the following question: "From what you have heard of the case, and what you have read of it, and what you know of it, what are your views of it?" To the question and the evidence called for under it, the prisoner's counsel objected on the ground that the witness had not heard the whole of the evidence, and it was not competent for the witness to give an opinion upon the evidence as to the prisoner's mental state at the time of the act, without having heard the whole of the evidence. The court overruled the objection, and the prisoner's counsel excepted. The witness then gave an opinion unfavorable to the defence. The sources of information from which the witness was permitted to draw his facts, and upon which to base his opinion, were as broad and various as the question he was called upon to answer, indicates, viz: what the witness had *heard* of the case, what he had *read* of it, and what he *knew* of it. It is clear that what the witness had heard of the case out of court, or from any other source than witnesses under oath, or from his own personal knowledge of the

The People v. Thurston.

prisoner, would not form a legal foundation, on which to base a professional opinion, nor could it be possible to base such opinion upon evidence read in the newspapers by him. But the witness was allowed to give his opinion of prisoner's sanity, on information derived from such objectionable sources; and he was likewise permitted to give his *views of the case*. This was also improper. On trials involving inquiries as to the sanity of prisoners, a witness should not be permitted to give his opinion on the case, or on the question of guilt, but only on the question of sanity. (*Jameson v. Drinkald*, 12 *Moore*, 157.) But the objection made by the prisoner's counsel, to the question put, was not sufficiently specific to reach the criticisms above made, and he can not, therefore, avail himself thereof on this bill of exceptions. I shall therefore confine my attention to that portion of the objection which was clearly and broadly made, that this witness should not be permitted to give a professional opinion on the prisoner's insanity, because he had not heard all the evidence, tending to establish insanity, which the prisoner had adduced.

This is a highly important question, and seems not to have been clearly decided in any adjudicated case, but there are *dicta* to be found in the books, which seem to indicate that in the opinion and practice of the courts, a medical witness called to give an opinion on the question of insanity, where that opinion is to be based upon facts testified to by other witnesses, must hear all the evidence tending to prove insanity. The general rule laid down by Phillips (1 *Ph. Ev.* 290,) is, "The opinion of medical men is evidence as to the state of a patient whom they have seen. Even in cases where they have not seen the patient, but have heard the symptoms and particulars of his case described by other witnesses at the trial, their opinion on the nature of such symptoms has been properly admitted. Thus, on a question of sanity, medical men have been permitted to form their judgment upon the representation which witnesses upon the trial have given of the conduct, manner and general appearance exhibited by the patient."

Upon the discussion which took place in the English house

The People v. Thurston.

of lords, in 1843, in consequence of the acquittal of Daniel McNaughten, for the murder of Mr. Drummond, the following question amongst others, was propounded to the judges, in relation to the defence of insanity, viz., "can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, *but who was present during the whole trial, and the examination of all the witnesses*, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, &c.?"

To this question an affirmative answer was given, (47 *Eng. Com. Law Rep.* 29.) The form of the question above given, clearly indicates that the medical witness must hear the whole evidence, in order to qualify him to give an opinion. So in *Rex vs. Searle*, (1 *M. & Rob.* 75,) it was held, that a medical man *who had heard the trial*, may be asked whether the facts proved show symptoms of insanity? Here again, the medical witness must have heard the whole of the evidence.

So in *McNaughten's case*, (10 *Cl. & Fin.* 200,) it was held that a medical man, *who has been present in court and heard the evidence*, may be asked as a matter of science, whether the *facts stated by the witnesses*, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong. Here again, it is quite apparent that the witness heard the whole of the evidence tending to prove insanity.

So in *Chitty's Medical Jurisprudence*, page 356,) the rule is laid down thus. "The opinion of medical witnesses, who have seen the alleged lunatic, is unquestionably admissible, and although they have not seen the lunatic, yet their opinion *after hearing all the evidence*, whether or not a person having so acted, and evinced such delusions, ought to be deemed a lunatic, it seems, is admissible.

By the criminal law of Scotland, the medical witnesses, who are to give a professional opinion, must hear the whole facts of the case detailed by the other witnesses, whether professional or ordinary, who are examined in the cause; and medical witnesses therefore are exempt from the rule which excludes all

The People v. Thurston.

the witnesses from the court room, except the witness under examination, (2 *Allison's Cr. Law of Scotland*, 544.)

The above cited authorities, in the absence of even a *dictum* to the contrary, should settle the question in favor of excluding a witness's opinion, who stood in the situation of Doctor Eastman. But in the absence of all authority on the question either way, it seems to me, the legal mind must come to the same conclusion, to which the above authorities tend.

The reason of the rule, which admits the opinions of medical men on questions of insanity, is that they who have devoted their attention for a long time to diseases of the body and mind, become experts in discovering and properly appreciating the physical and psychological evidences of that deplorable malady. They become skilled in the phenomena attendant upon an abnormal mental condition; and the facts bearing on the question of insanity are the letters of the alphabet, by means of which they are enabled to spell out the true mental condition of the patients, and explain it to the jury, who are presumed not to understand the subject. For if the jury had the same skill and science as the medical witness, the testimony of the latter would be useless and inadmissible. The opinions of such witnesses are intended to aid, guide and lead the jury to a true conclusion on a subject often shrouded in impenetrable mystery, and always difficult of solution.

The opinions of medical men skilled in diseases of the mind, are therefore substantive evidence in the cause in the same sense that the evidence of an interpreter of an unknown language, is evidence of the meaning of that language.

It would seem to be a just inference, from the reason of the rule allowing such evidence, that the medical witness should be in possession of all those facts tending to prove insanity, before he should be permitted to give an opinion negating insanity. His opinion on half the facts of the case on which the jury are to decide the cause, must be utterly worthless, for it may well be that the same witness, with all the facts before him would pronounce a very different opinion.

The People v. Thurston.

It is said, that as the jury hear all the facts of the case, they will not overweigh the opinion of a medical witness, who has heard only a part of the facts. But who knows that for a certainty? Who has the right to impose upon the prisoner the hazard of the experiment? It must be remembered that the jury to whom the evidence is addressed, are presumed to be ignorant of the disease, by the rule which permits the opinions of such witnesses; and if so, how are they to distinguish between, and duly weigh the importance of the additional facts known to them, but which the medical witness has not heard.

If the jury possessed the same skill as the medical witness, there would be less reason for the objection to an opinion on a partial statement of the facts, because the jury could be presumed capable of determining the relative importance of the facts known by the medical witness, and those not known by him. But as the jury do not possess the same skill as the medical witness, his opinion, on a partial statement of the facts, must be worse than useless, for it tends to confound and mislead the jury by imposing upon them the duty of at least *attempting* to weigh the relative importance of the facts, upon which the opinion of the medical witness is based, and the other facts in the cause, which were unknown to the medical witness, and did not, therefore, enter into his reasonings in the result arrived at by him.

That jurors are deemed unskilled in the disease of insanity, is evident from the fact that they, as witnesses, would not be permitted to give an opinion on facts testified to by others, whether a person is insane. And it is now a mooted question, whether they can express an opinion on the subject in connection with a relation of the facts, known to themselves and on which such opinion is founded. (7 Barb. S. C. Rep. 314.)

It has always, since I have examined the subject, seemed to me to be a clear proposition, that no medical witness should be permitted to express an opinion against the allegation of insanity, until he has heard all the evidence tending to prove

The People v. Thurston.

the affirmative of the proposition, and that where the medical witnesses are men of integrity and skill, and all agree that a given state of facts proves insanity, it is the solemn duty of the jury so to pronounce by their verdict. Such, too, is the rule of evidence. *Cuilibet in arte sua credendum est.* Otherwise, you would permit the opinions of a jury, unskilled in the disease of insanity, to overrule the opinions of the experienced medical witnesses on the same state of facts. And so would it be also on other subjects where the evidence of experts is invoked to aid in the attainment of truth.

I do not mean to be understood as holding that the medical witness must himself hear the facts testified to by the other witnesses tending to prove insanity. If those facts are all stated over to him by the court or counsel it is sufficient. And they may be stated hypothetically, as indeed they must be in the nature of things, because the jury are alone the judges what facts are proved. But what I contend for is the essential principle that the basis of facts upon which the medical witness is to reason and build conclusions, must be as broad as that of the jury, to whom they stand in the position of interpreters. From the very nature of the inquiry, there must be an evident distinction between the evidence to *prove* and evidence to *disprove* insanity, for while it is impossible to *negative* the presence of the disease until we have heard and considered all the affirmative evidence tending to prove its existence, yet the converse of the proposition is not true, and the affirmative of the issue may be proved without hearing all the evidence, because some one or more facts may be so decisive of the case as to render all other testimony superfluous and unnecessary. Having arrived at the conclusion on the ground both of reason and authority, that the testimony of Doctor Eastman was erroneously admitted, a new trial must be granted and I will not examine the other alleged errors insisted on by the prisoner's counsel, but will leave them to be corrected or avoided on the new trial.

Conviction reversed and new trial granted.

SUPREME COURT. Albany General Term, September, 1853.
Harris, Watson and Wright, Justices.

JOHN SKIFF pl'ff in error *vs.* THE PEOPLE def'ts in error.

In an indictment for obtaining property by false pretences, it is sufficient to allege that the property was delivered to and obtained by the defendant by means of the false pretences particularly stated and negatived, without setting forth whether the property was so obtained by a sale or bailment or otherwise: and on the trial, under such an indictment, it is competent to prove in what manner the property was obtained, whether by sale, or bailment, or in any other way.

Where, in such a case, the indictment charged the pretence of owning two pieces of land, in the town of Easton in the county of Washington, designating them as the "Home farm," and the "Van Schaack farm," the description was held to be sufficiently definite.

Where the property was obtained on credit, and the person parting with the property was to receive a note payable at a bank, on which he could get the money, it was held to be competent for the public prosecutor to prove that the note was not paid, though the fact that the note was not paid, was not alleged in the indictment.

It is not necessary to negative all the pretences in an indictment for such an offence, nor to prove all that are negatived to be false.

Whether the prosecutor used ordinary prudence and diligence, in inquiring into the truth of the pretences, and whether the pretences were sufficient to deceive, are questions of fact for the jury.

Where it appeared that the false pretences were made, and the property obtained by them was delivered in the county of Washington, that was held to be the proper county for the trial of the offence, though it appeared that by agreement of the parties the note given for the property was not made and delivered till a subsequent time and in a different county.

Error to the Washington county Sessions. The indictment alleged that in September, 1850, at the town of Easton, in the county of Washington, Skiff, with the intent to cheat and defraud one Samuel Hale, did falsely pretend and represent to Hale that he was the owner and possessor of two pieces of land in Easton, (afterwards designated as the Home farm and the Van Schaack farm,) 2000 bushels of grain, 160 head of cattle, and other property; that the land and personal property was unincumbered, and that he was able to pay his debts, and had always paid his

Skiff v. The People.

debts when due; that Skiff did then and there show to Hale certain real and personal property, viz: 2000 bushels of grain, eighty head of cattle, and two pieces of land, and falsely pretended and represented to Hale, that he owned and possessed such real and personal property thus shown; that the real and personal property so shown was unincumbered, and that he did not owe for the Home farm or place, and that the Van Schaack farm was about paid for, and that his business of buying and selling cattle was profitable, and he was making money out of it; that Hale believing the false pretences and representations made as aforesaid by Skiff, and being deceived thereby, was induced by reason of them, to deliver, and did then and there deliver to Skiff, thirty-nine head of cattle, of the value of \$600, the property of Hale, and Skiff designedly received and obtained the cattle by means of the false pretences and representations as aforesaid, and with the intent designedly to cheat and defraud Hale of the cattle. The indictment then proceeds to negative the pretences, averring knowledge by Skiff of the falsity of such pretences and representations, and concludes as follows: "And the jurors aforesaid do say that the said John Skiff, by means of the false pretences aforesaid, at the town and county aforesaid, did feloniously, unlawfully, falsely, knowingly and designedly receive and obtain from Hale, of the proper moneys, valuable things, goods, chattels, personal property and effects of the said Hale, with intent feloniously to cheat and defraud the said Hale of the same."

To this indictment Skiff interposed the plea of not guilty, and at a Court of Sessions held in July, 1852, the cause came on for trial.

Samuel Hale was called and sworn as a witness, on behalf of the people. He testified that in September, 1850, he owned thirty-nine head of cattle, and drove them to Easton Corners, when he met Skiff, whom he had known previously. He told Skiff that he had thirty-nine head of cattle with him; when Skiff informed him that he wanted to buy some cattle.

Here Skiff's counsel objected to the showing of any bargain or sale of the cattle on the grounds, 1st, That no bargain

Skiff v. The People.

and sale were alleged in the indictment. 2d, That the property and its location were insufficiently described in the indictment to admit of any proof thereof. The objection was overruled by the court and the defendant excepted.

The witness then testified, in substance, that at Skiff's solicitation, he got into his carriage and rode with him. Skiff spoke to the witness of a place he had bought of Van Schaack two or three years before, and the improvements he was and had been making; he showed the new fences he had made and told the witness the manner in which he had cultivated the land, and about his crops. He remarked, "what a fine chance the grass would give the young cattle you are driving, and I have a great deal such and better on the home farm." Skiff pointed in the direction of the cattle on the Van Schaack farm and in answer to the inquiry of the witness replied that he had over 100 head. As the witness got into the wagon to return he praised Skiff's improvements, and said he must be doing well. Skiff replied that he was doing pretty well. Witness asked Skiff how long he had had the farm? He told. Witness then said, you have got it pretty much paid for. He replied, yes. Skiff showed witness the grain. He said that he had 2000 bushels of oats and over, and did not owe anything for them. After tea, and the cattle had been put up, Skiff was in the field looking at them. Witness requested him to look over the cattle and make him an offer for them. He looked them over, and asked witness to set a price that he would take for them. Witness set his price and Skiff told him that he could not take them at that price. They soon agreed upon a price. At the price agreed upon the cattle came to \$600. Before they agreed upon the price, Skiff said that he had not the money and wished to give the witness what he called a good bank note. He said the witness could get the money on the note if he wanted to use it. Witness told him that he supposed he could; he presumed they could deal as he had shown up pretty well. Skiff said his circumstances were as he had stated; he always paid his notes as they became due; that he was pretty much out of debt; that the home farm

Skiff v. The People.

was unincumbered, and the Van Schaack farm was nearly paid for; that he was out of debt except a balance on the Van Schaack farm. Skiff did not say how much was due on the Van Schaack farm. He did not give a note at the time the cattle were weighed; the next day Hale went with the defendant to Troy; they went into Harrington's office in Troy, when Skiff made a note for \$600, payable to Hale's order; Hale said it was not as he expected, it should have been to some one else's order; Hale took the note.

The District Attorney then asked the witness if the note had been paid? The defendant's counsel objected that it was not alleged in the indictment that the note was not paid. The court overruled the objection, and the defendant's counsel excepted.

The witness further testified that the note was dated 20th September, 1850, payable three months from date; it was not paid; it was payable at a bank in Troy; witness got it discounted at Whitehall, and when it became due paid it; two weeks after the giving of the note had a conversation with Skiff; witness had then heard that he had failed; he asked him if he had made arrangements to pay the note when it became due; he said no, he did not expect to pay a shilling of it; witness asked him why he had deceived him in such a way? he said he had been carrying a heavy load for several years and he had to throw it off on to other people's shoulders; he said his property was all mortgaged, he owed a great deal more than he could pay; the witness says that the representations which he made of his circumstances, induced him to let him have the cattle; he should not have let him have the cattle except for these representations; witness inquired of no person whether Skiff's lands were unincumbered; he made no searches to see if he owned the lands, nor any searches for chattel mortgages; knew Skiff and had sold him cattle at other times, and up to the time of making the bargain had never heard his circumstances spoken against.

It was then proved that after Skiff's failure, which must have been soon after the cattle trade with Hale, he was examined in

Skiff v. The People

relation to his debts and assets. He stated his debts to amount to \$26,215, and his assets \$13,365; also that for two years he had known that he was not able to pay his debts. Skiff further stated that for a portion of the land he had nothing but a verbal contract; there were 92 acres of the whole, 7 acres of which he bought at \$40 per acre, and had a deed for it, for the balance he had only a parol agreement with Van Schaack. He had paid Van Schaack \$200 or \$300, and had made \$400 or \$500 worth of improvements on the place. The cost price of place was \$26,000.

It was further proved that about the time of his failure, Skiff showed to a witness notes to the amount of \$2,250, on which he had been an endorser, and said he had all that money to pay; that this brought him to where he was now; that he had known for five years that he could not pay his debts, with that load on his shoulders; that he had tried to get released from the notes. He was asked why he did not give up before; he replied because he hated to make a muss.

This was the substance of the testimony on the part of the people, at the close of which, the counsel for the defendant moved to quash the indictment on the grounds: 1st. That the indictment does not allege a sale from Hale to Skiff, or any other bargain, or any other means by which the property was transferred from one to the other: 2d. It does not allege that Hale parted with his property at all: 3d. It does not allege that he did so in whole or in part, in consequence of these representations: 4th. It does not allege any sale from Hale to Skiff on credit: 5th. It does not allege that Skiff has not paid for the property: 6th. It does not allege that he has refused to pay: 7th. It does not allege that any pay day has arrived: 8th. That it does not falsify all the pretences, nor does it properly allege the falsity of those attempted to be falsified: 9th. The defendant's counsel renewed the objections already specified in objecting to the evidence under the indictment. The court refused to quash the indictment on either or all of said grounds, and defendant's counsel excepted to such refusal.

The defendant's counsel then moved for the discharge of the

Skiff v. The People.

defendant upon the evidence on the following grounds: 1st. Because by the evidence it appeared that Hale parted with his property under the understanding on his part, that he was to receive a good endorsed note, and not on the faith of the representations made by Skiff. 2d. That Hale had not shown ordinary diligence on his part to ascertain defendant's circumstances, although it was proven that he had abundant means within his power to ascertain the same. 3d. That the Court of Sessions had no jurisdiction to try the cause, as the property in the cattle remained in Hale, until the note for the purchase money was received by him of the defendant in the city of Troy. And that even the possession of the property was not changed, the cattle remaining in the same lot, and that the defendant could only be tried in the county of Rensselaer, where the offence if any, had been committed. The court, as to the several grounds of the motion for the discharge of the defendant upon the evidence, held, that the question raised involved matters of fact for the consideration of the jury under the charge of the court, and that the defendant's motion to be discharged was denied, to which decision and refusal the defendant's counsel excepted.

The jury found the defendant guilty, and the court imposed on him a fine of \$250, and to stand committed until the same be paid.

C. R. Ingalls, for plaintiff in error.

J. Potter, (District Attorney,) for defendants in error.

By the Court, WRIGHT, J.—The first objection is, to the sufficiency of the indictment: the second to the proof sustaining it. Under these two general objections, we are to consider the case.

1. As to the indictment. It alleges that the defendant, with the intent to cheat and defraud one Samuel Hale, made certain false pretences, which pretences are set forth with particularity in the pleading; that Hale, believing such false pretences and representations, was induced by reason of them to deliver, and

Skiff v. The People.

did then and there deliver to the defendant, thirty-nine head of cattle, of the value of \$600, of the property of Hale; and the defendant did designedly receive and obtain the cattle by means of the false pretences, and with intent to cheat and defraud Hale. The pleading charges in the language of the statute, that the defendant with intent, &c., did obtain from Hale, certain personal property, &c. That Hale was induced by the false pretences to deliver, and did deliver to the defendant, and that the defendant did receive and obtain, certain cattle. It does not, however, in terms allege a sale of the cattle from Hale to Skiff, or any other bargain, by which the property was transferred from the one to the other; and accordingly when the public prosecutor proposed to show a bargain and sale of the cattle, by which they were transferred, the defendant objected, on the ground that no bargain and sale were alleged in the indictment. We are of the opinion that the indictment is not defective in this respect. It sufficiently alleges the facts constituting the crime. The offence consists in obtaining the property, whether this be through a sale or bailment, or in any other way. The fact is specifically alleged that the cattle were delivered to, and obtained by the defendant by means of the false pretences, that is, that they were transferred to him. And under this allegation, evidence of the manner of the transfer was admissible.

Another objection taken to the proof of any bargain and sale of the cattle, was that the property and its location was insufficiently described in the indictment to admit of any proof thereof. From the indistinctness of this objection, it is a little difficult to say what property is alluded to. But the counsel for the defendant tells us that he referred to the two pieces of land which Skiff, as the pleading alleges, pretended to own. The indictment charges the pretence of owning two pieces of land in the town of Easton, in the county of Washington, designating them as the Home farm or place, and the Van Schaack farm. This description seems to us to be sufficiently definite. It is unlike the case of *The People v. Lord*, (9 Barbour, 675,)

Skiff v. The People.

where the indictment described the lands generally to be in the state of Texas.

Hale parted with his property on credit. It was part of the agreement by which Skiff obtained the cattle, that he was to give a note payable at a bank, on which Hale could get the money. On the trial, the district attorney asked the witness if the note was paid; to this question the defendant's counsel objected, on the ground that it was not alleged in the indictment that the note was not paid. The court overruled the objection, and the defendant's counsel excepted. There was no error in this. It was no reason for rejecting the inquiry, that the fact of non-payment had not been alleged in the indictment. Had the objection been that the offence charged required no proof of the nonpayment of the note to make it complete, and consequently such proof was immaterial, there might have been more force in it. But then we could hardly have come to the conclusion that it was wholly irrelevant. It tended at least slightly, in connection with other proof in the case, to characterize the *quo animo* of the transaction on the part of the defendant.

There is nothing in the objection that the indictment does not falsify all the pretences. It is not necessary to negative all the pretences in the indictment, or to prove all that are negated to be false. (9 *Wend.* 182; 11 *Wend.* 557.)

2. As to the sufficiency of the proof. At the close of the testimony, the defendant's counsel moved for his discharge, for the reasons, 1st. That by the evidence it appeared that Hale parted with his property under the understanding, on his part, that he was to receive a good endorsed note, and not on the faith of the representations made by Skiff. 2d. That Hale had not shown ordinary diligence to ascertain the defendant's circumstances, although it was proved that he had abundant means within his power to ascertain the same. 3d. That the Court of Sessions had not jurisdiction to try the cause; and that it could only be tried in the county of Rensselaer, where the offence, if any, had been committed. The court denied the motion for discharge, holding that the questions raised involved matters of fact for the consideration of the jury.

Skiff v. The People.

If the fact had stood out in the case uncontroverted, that Hale was not influenced in parting with his property by the false pretences and representations of the defendant, but that he relied on an agreement that he was to receive a good indorsed note, the court should have discharged him or at least directed the jury to acquit. But this was not so. Hale expressly testifies that he was induced by the defendant's representations of his solvency, his ability to pay, &c., to let him have the cattle, and that except for such representations being made, he should not have parted with his property.

The case does not show that Hale did not use ordinary prudence and diligence in inquiring into the truth of the pretences. He inquired of Tabor, the landlord, and neighbor of the defendant. But the degree of prudence, and the sufficiency of the pretences to deceive, were questions of fact for the jury, and they have found against the defendant.

I do not think there is any force in the point as to jurisdiction. The transaction took place in the county of Washington. It was there the pretences were made and believed, and the cattle weighed and delivered. The sale was there consummated and possession taken of the property. The waiving, by Hale, of the giving of the note until the parties arrived in Troy, can not have the effect to change the place of making the representations and the delivery of the cattle. It is sufficiently clear from the evidence, that the offence for which the defendant was indicted, was committed in the county of Washington; that there the defendant obtained the property from Hale, and of course the Court of Sessions of that county had jurisdiction.

The judgment of the Court of Sessions of the county of Washington is affirmed.

SUPREME COURT. Onondaga General Term, December, 1853.
Gridley, W. F. Allen Hubbard and Pratt, Justices.

JAMES MCGUIRE pl^{ff} in error *vs.* THE PEOPLE def^{'ts} in error.

To give validity to proceedings in the Oyer and Terminer, it is necessary that process for summoning the petit jury should be issued, and that it should also be returned and filed in the office of the clerk of the county.

Where, after a trial and conviction for murder at the Oyer and Terminer, it appeared, on writ of error, that no precept for summoning the petit jury had been returned and filed, the conviction was held to be erroneous and the judgment was reversed.

It seems, also, that the issuing of the precept is necessary to give validity to the acts of the grand jury, and that, after verdict, the prisoner may, on error, avail himself of the objection that no precept had been issued for summoning the grand jury. Per *Pratt, J.* (a)

Form of an allegation of diminution—*certiorari* issued thereon,—return thereto—joinder in error, &c.—demurrer to joinder and joinder in demurrer.

Error to the Onondaga Oyer and Terminer. It appeared by the return to the writ of error that the plaintiff in error had been indicted, tried and convicted of the murder of James W. Holland, and sentenced to be executed on the 17th of August, 1853. After a general assignment of errors, the plaintiff in error made a special assignment and alleged diminution as follows:

And the said James McGuire comes here into court and alleges that the judgment aforesaid, in form aforesaid given, is erroneous in this to wit:—That no venire or precept was issued by the district attorney of the county of Onondaga to the sheriff of the county of Onondaga to summon the grand jurors by whom the indictment aforesaid was presented, nor was any venire or precept served by the sheriff of the county of Onondaga upon the grand jurors or any return made by said sheriff to such venire or precept as required by statute in such case made and provided, and the said James McGuire also alleges

(a) A different opinion is expressed on this point in *The People vs. Robinson*, *infra*

McGuire v. The People.

that the judgment aforesaid in form aforesaid given is erroneous in this to wit: That no venire or precept was issued by the district attorney of the county of Onondaga to the sheriff of the county of Onondaga to summon the petit jurors from whom the jury was formed by which the said James McGuire was tried and convicted, nor was any such venire or precept served or returned by the sheriff of the county of Onondaga, as required by the statute in such case made and provided. And the said James McGuire prays a writ of certiorari of the the people of the state of New York to be directed to the justices and judges of the Court of Oyer and Terminer in and for the county of Onondaga, to certify to the said justices of the Supreme Court in and for the fifth judicial district of the said state of New York, the truth of the same, and it is granted to him, &c. And the said James McGuire prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid may be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, &c.

DEWITT C. BROWN, *Att'y, &c.*

LEROY MORGAN, *of Counsel.*

Whereupon a *certiorari* was issued as follows:

The People of the state of New York to the Justices and
[L. s.] Judges of the Court of Oyer and Terminer in and
for the County of Onondaga, Greeting:—

We being willing for certain causes to be certified whether a venire or precept was issued by the district attorney of the county of Onondaga to the sheriff of the county of Onondaga, to summon the grand jurors by whom a certain indictment for the crime of murder was presented to our said Court of Oyer and Terminer against James McGuire, or whether such or any venire or precept was served by said sheriff on said grand jury, or whether any return to such venire or precept has ever been made by such sheriff, and also whether a venire or precept was issued by the district attorney of the said county of Onondaga

McGuire v. The People.

to the sheriff of the said county of Onondaga to summon the petit jurors from whom the jury was formed by which the said James McGuire was tried and convicted, and whether such or any venire or precept was served by the said sheriff upon the said petit jurors or returned by him, do command you, that having searched the files and entries and other records and memoranda of the said Court of Oyer and Terminer, being in your custody of record, what you shall find therein concerning the said several venires or precepts, and return thereof, or either of them you certify, to our justices of our Supreme Court of Judicature in and for the fifth judicial district of the state of New York, without delay, fully and entirely as the same remain in your custody, together with this writ. Witness, Daniel Pratt, Esq., Justice of the Supreme Court at the city of Syracuse, the 12th day of July, A. D., 1853.

BARNARD SLOCUM, *Clerk.*

DEWITT C. BROWN, *Att'y for James McGuire.*

The following is the return to the writ of *certiorari*:

Supreme Court.

James McGuire, Pl'ff in Error.	}	In obedience to the writ of certiorari, served upon me in the above entitled action, I do hereby make return thereto as follows:
vs. The People of the State of New York, Def't in Error.		

1st. As to whether a venire or precept was issued by the district attorney of the county of Onondaga, to the sheriff of said county to summon the grand jury by whom a certain indictment for the crime of murder was presented to our Court of Oyer and Terminer, against James McGuire, I return that I have no knowledge.

2d. As to whether such venire or precept was served by said sheriff upon said grand jurors, I return that I have no knowledge.

3d. As to whether any return to such venire or precept has been made by said sheriff, I return that I have examined the

McGuire v. The People.

records and files in my office, and I find that no such venire or precept has been returned and filed in my office.

4th. As to whether a venire or precept was issued by the district attorney of Onondaga county to the sheriff of said county to summon the petit jurors from which the jury was formed by which the said James McGuire was tried and convicted, I return that I have no knowledge.

5th. As to whether such venire or precept was served by said sheriff upon the said petit jury, I return that I have no knowledge.

6th. As to whether such venire or precept has been returned or filed in this office, I make return that I have examined the records and files in my office, and find that no such venire or precept has been returned or filed in my office. All of which is respectfully returned.

Witness my hand and seal, this 3d day of August, 1853.

[L. s.] BARNARD SLOCUM,
Clerk of Onondaga county and ex-officio Clerk of
the Court of Oyer and Terminer therein.

The joinder in error was as follows:

Supreme Court.

The People, Deft's in Error,	} Joinder.
vs.	
James McGuire, Pl'ff in Error.	

And hereupon the said people of the state of New York, who prosecute by R. H. Gardner, district attorney and attorney for said people, defendants in error, thereupon freely come into court and say that by reason of anything for error assigned by the general assignment, and by the special assignment and allegation of diminution, and the return thereof of the clerk of this court to the writ of certiorari, issued and returned in this case, the judgment aforesaid ought not to be revoked, reversed and held for nought, because they say that a precept was issued and delivered to the sheriff of the county of Onondaga aforesaid, by the district attorney thereof, to summon the said petit jurors from whom the jury was formed by which the said

McGuire v. The People.

James McGuire was tried and convicted, and which remains on file in the office of said sheriff, and thereof they put themselves upon the country, &c. And because they say that it is not error because the said writ was not filed in the office of the clerk of the said county of Onondaga aforesaid. Nor is it error because no precept was issued and delivered to the said sheriff by the district attorney aforesaid to summon said grand jury of said county, by whom said indictment aforesaid was presented. Nor because the said sheriff did not summon said grand jury by virtue of a precept issued by the said district attorney and return made by said sheriff, and precept filed with the said clerk of Onondaga county. Nor is said judgment erroneous; nor should the same be revoked, reversed or held for nought, for any other allegation, matter or thing alleged for error, and in the said allegation of diminution and for any matter appearing by the return of said writ of certiorari. Nor is there any error in the proceedings or in giving the judgment aforesaid, and they pray that the said Supreme Court may proceed to examine as well the record and proceeding aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given, may be in all thing affirmed.

R. H. GARDNER,

Dist. Att'y and Att'y for Def'ts in Error.

This was followed by a demurrer and joinder in demurrer as follows:

Supreme Court.

James McGuire, Pl'ff in Error,	}	Demurrer to Joinder.
vs.		
The People of the State of New York, Def'ts in Error.		

And the said James McGuire, plaintiff in error, by Dewitt C. Brown, his attorney, comes and says that the said joinder of the said defendants in error to the said allegation of diminution of the said plaintiff in error, and the matter therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to answer the matters set

McGuire v. The People.

forth in the said allegation of diminution, or any part thereof, and this the said plaintiff in error is ready to verify.

Whereupon, for want of a sufficient joinder or answer to said allegation of diminution in this behalf, the said plaintiff prays judgment, &c.

DEWITT C. BROWN,

DEWITT C. BROWN,

Att'y for Pl'ff in Error.

Supreme Court.

The People of the State of New York, Def's in Error, } The said people, defendants in error, by R. H. Gardner, district attorney, say that the said joinder and plea to said assignment of error and allegation of diminution and return and the matters therein contained, are sufficient in law to answer the matters set forth in said assignment of error and allegation of diminution and other matters alleged for error to sustain the said judgment, and this the said defendants in error are ready to verify, and wherefore inasmuch as the said plaintiff hath not denied, nor in any manner answered the said joinder and plea in this behalf, the said defendants in error pray judgment, &c.

R. H. GARDNER,

District Attorney.

Leroy Morgan and Hervey Sheldon, for plaintiffs in error.

I. As to the grand jury who found the bill of indictment, it is admitted by the record that no precept was issued to summon them; and as to the petit jury that tried McGuire, it is claimed that a precept was put into the hands of the sheriff, but it is admitted that none was returned or filed in the clerk's office.

II. The claim that one was issued amounts to nothing; for nothing but the record comes up on this motion. It might be proper to consider it on a motion in the court below, to file it *nunc pro tunc* and amend the record.

III. The case therefore stands upon the *naked record*, which shows that no precept or venire process was issued and returned to summon either the grand jury that found the bill of indictment, or the petit jury which tried and convicted the

McGuire v. The People.

prisoner. The statute of this state absolutely requires this process. (2 *Rev. St.* 206, § 37 and § 38.)

It is recognized as a process, (2 *Rev. St.* 438, § 69) in the statute, regulating proceedings on the election or appointment of a new sheriff, and is doubtless to be returned by the sheriff with his endorsement of his doings thereon, signed by him. (See § 75-77, of 2 *R. S.* 440, 414; 2 *R. S.* 722, sec. 11 and 12.)

It was necessary at common law, and is still held necessary except where it is abolished by statute. (1 *Chitty's Cr. Law*, 310, 503; 1 *Spencer*, 218; *Chuse v. The State*.)

And its omission is fatal to the conviction in this case. (18 *John R.* 212; *People v. McKay*, 2 *Southard*, 539; *Nicholas v. The State*, 1 *Richardson*, 188; *The State v. Williams*, 1 *Spencer*, 218; 1 *R. L.* 328, sec. 17; 2 *R. S.* 733, sec. 4; *Halsted*, 298.)

IV. The revised statutes abolish this venire process in Courts of Sessions. (2 *R. S.* 724, § 25.) And in civil cases, (2 *R. S.* 410, § 9.)

It being still required in Courts of Oyer and Terminer it can not be dispensed with. This and the other statutes regulating the summoning and return of grand and petit jurors, being *in pari materia*, must be read and considered together. *Spencer*, Ch. J. in 18 *J. R.* 217.

And in affirmative statutes, such parts of the prior as may be incorporated into the subsequent statute, or are consistent with it, must be considered in force. (3 *How. U. S. R.* 636.)

And every clause and word of a statute shall be presumed to have been intended to have some force. (22 *Pick.* 571.)

If they may stand together they shall. (4 *Gill. and John.* 1, and see 4 *Blackf.* 148.)

R. H. Gardner, (District Attorney,) for the people.

I. The precept required to be issued by the district attorney commanding the sheriff "to summon the grand jurors," is merely directory, and the want of it did not prejudice the rights of the defendant, for the following reasons, viz:

McGuire v. The People.

1st. This precept is required by the 44th section of chapter 1, title 4, and part 111 of the revised statutes, commanding the sheriff first to summon the jurors who shall have been drawn in his county pursuant to law.

2d. To bring before the court all prisoners in prison, and to bring all process, proceedings, &c., concerning said prisoners, &c.

3d. To make proclamation in the manner described by law, notifying persons bound by recognizance to appear at such court, and requiring all justices of the peace, coroners, &c., to return the writs and precepts in their hands, &c.

This precept has nothing to do with the drawing or summoning either the grand or petit jurors. That is provided for in a separate statute to wit: title 4, chap. vn, part 3, and article 2, page 507 of volume 2 of the third edition of the revised statutes.

If this precept was necessary, the want of it was waived by the defendant in going to trial without objection upon that ground, and it can not be objected in this way that there was any irregularity in the summoning or empanneling of the grand jury. (1 *Selden's Reports*, 531.)

This precept is unnecessary, so far as Courts of Sessions are concerned, and yet the grand jury at the sessions may indict for murder or arson. (2 *R. S.* 724.)

II. The statute of 1813, required the sheriff to summon the jury by virtue of a writ of venire facias, and no drawing then took place. (*Laws of 1813*, pages 226, 227, vol. 1; pages 339, 340, vol. 1, *Laws 1813*.)

The manner of summoning jurymen for the Court of Sessions, is pointed out by section 4th of chapter 18, of the laws of 1813, pages 150, 151, vol. 2.)

No venire is now necessary, the same being dispensed with by the laws of 1827, and by the revised statutes. (*Laws 1827*, page 312, § 1, 2; 2 *R. S.* 3 ed. page 807; *Graham's Practice*, 2d ed. 273.)

III. These matters may be amended even after judgment, where the substantial rights of the party are not injured or preju-

McGuire v. The People.

diced. And no pretence is made in this case that the defendant is prejudiced by the omissions complained of. (7 *Wend.* 417, 2 *R. S.* 3d ed. 519; 7 *Cowen*, 382; 4 *Denio*, 68; 4 *Cowen*, 550; *Chamberlain v. Spencer*.)

The principle governing in cases of this kind, is that if no injustice was done the party, the court will not interfere. (*People v. Vermilya*, 7 *Cowen*, 382; 12 *East.* 230; 4 *Barn. & Ald.* 430; 5 *Cowen*, 289; 7 *Cowen*, 232; 6 *Cowen*, 584; 7 *Wend.* 417.)

PRATT, J.—It is conceded in this case, that no precept was issued by the district attorney for summoning the grand jury, who found the bill of indictment against the prisoner. The district attorney has pleaded to the special assignment of error, that a precept for summoning the petit jury, by whom he was convicted was actually issued, and that the same is now on file in the office of the sheriff of the county. It appears, by the return of the clerk to the certiorari, which was issued to him upon an allegation of diminution, that no such precept has ever been returned to the office of the clerk of the court, and that none is on file in this office. It is insisted by the counsel for the prisoner, that the mere issuing such precept is of no avail, but that it must be returned by the sheriff to the court, that it may be filed and become a part of the record, that the want of the precept and return in the record brought up, is error for which the judgment should be reversed.

I am inclined to the opinion, that this position is correct. The office of the writ of error, is to bring up the record for the inspection of the appellate court, as well the judgment record as any of the out branches of the record, which are claimed to be defective.

The execution of the process of the court, can only appear by the return of the officer whose duty it is to execute it, and no action of the court, based upon the execution of such process can be regularly taken, until it shall appear by the records themselves that such process has been duly executed.

Hence it follows, that the regularity of all the proceedings

McGuire v. The People.

of the court should appear by the record itself, and, upon writ of error, if the appellate court upon an inspection of such record, finds any material defect in it, the judgment should be reversed.

It is not necessary to decide whether the Oyer and Terminer might not have allowed a return to have been made and filed *nunc pro tunc*. No such thing was in fact done, and we must pass upon the sufficiency of the record as it now is. We come back then to the question, whether the omission to issue jury process is a fatal error, for which the judgment of the Oyer and Terminer should be reversed.

In regard to the precept for summoning the petit jury, the point has been directly adjudicated in this state, in the case of *The People v. McKay*, (18 J. R. 212.)

The prisoner in that case, had been convicted of murder at the Alleghany Oyer and Terminer. It was moved upon a return to a certiorari, showing that the precept for summoning the petit jury was without seal, and that no return had been made to it by the sheriff, that the judgment be arrested.

The motion was granted by the Court, Ch. J. SPENCER, giving the opinion.

It will be seen by examining the statutes in force at that time, and comparing them with the Revised Statutes, that they were substantially the same so far as they affect the question under consideration. (See 2 R. L. 508, sec. 13, 24 to 30; 1 R. L. 328; sec. 11 and 19; 2 R. S. 206; sec. 37 and 38; 1 R. S. 339; sec. 15 and 16.)

Precisely the same answers were made to the objection upon the argument in that case that were made upon this, to wit: that the jury were drawn and summoned pursuant to specific directions in the statute, and that a precept was therefore a mere matter of form. But the court in that case held the objection fatal, and arrested the judgment. The case was argued by very able counsel on both sides, and after careful deliberation, the decision, for aught that appears in the report, was made by the unanimous concurrence of all the members of that very able court. We should not, therefore, even if we

McGuire v. The People.

doubted its correctness, feel at liberty to overrule this decision; but we are satisfied that it is well sustained upon authority.

At common law, a precept to summon the jury was always necessary. (1 *Chitty Crim. L.* 505, 508.) The different courts had different kinds of process, but in all the courts, process of some kind was absolutely essential. It was the authority under which the sheriff summoned the jury, and it was only upon the return of the process, that the court acquired jurisdiction to impanel the jury and try the cause. In some of the courts a special *venire* was necessary in each case, but before the justices of jail delivery, a general precept was issued upon which a jury of a given number were summoned, out of which a panel for the several cases as they were tried, was awarded orally, thus conforming somewhat to our own practice. (1 *Chit. Crim. Law*, 506.)

Our statute, so far from dispensing with this process, peremptorily directs it to be issued by the district attorney of the county, at least twenty days before the time of holding any court of Oyer and Terminer, and in every such precept, the sheriff is commanded, among other things, "to summon the persons who shall have been drawn in his county pursuant to law, to serve as grand and petit jurors at the said court, to appear thereat." (2 *R. S.* 206, § 37, 38.) This precept is still, therefore, retained as the authority to the sheriff; and for disobedience to this, he may be attached or otherwise made amenable for neglect of duty.

Upon the opening of the court, when proclamation is made for him to return the writs and precepts delivered to him, it is his duty, if he has not before returned it, to return it then. Those provisions for returning the jurors by officers of towns, and for drawing the same by the county clerk and other officers, are made for securing the attendance of competent jurors, as well as for equalizing the burthen of jury duty among all the competent citizens of the county, but they do not in any wise affect the necessity of vesting the sheriff with competent authority to summon them and the court to impanel them. Similar provisions are contained in the English statutes, for

McGuire v. The People.

securing the attendance of competent jurors, and for equalizing the burthen of jury duty; but it was never supposed that such provision obviated the necessity of jury process. And a late English writer, in speaking of jury process in civil actions, remarks "that though the making out the jury process, getting it duly returned and annexed to the record, is now little more than a form, it is a form, the observance of which is so essential, that if it be neglected, there can be no valid trial of the cause." (*Smith on Actions at Law*, 125.)

Suppose the sheriff had entirely neglected to summon the jury, and that they had come together of their own accord, could a valid trial have been had in such a case? It seems to me very clear, that there could not have been a valid trial before such a jury, yet this record furnishes no evidence that the jury were not thus impaneled in this case. It is said that the legislature has abolished jury process in courts of Sessions and in civil cases. But this fact, instead of affording an argument in favor of the right to disregard the statute requiring process to be issued for summoning jurors for courts of Oyer and Terminer, affords an argument on the other side. The fact that the legislature has retained it for the latter courts, while it has been abolished for the former, shows that the distinction was designed; and it is not for the courts to decide what the statute peremptorily enjoins may be dispensed with as a mere matter of form and as unnecessary. If the abolition of such process is found to work well in courts of Sessions and in civil cases, the legislature may hereafter extend it to all the courts; but until that shall be done by legislation, we must follow the well settled rules of law in relation to it.

That the defect is vital and constitutes error in the record, for which the judgment should be reversed, is settled by repeated adjudications, both in this country and in England.

In *State v. Williams*, (1 Rich. 188,) in the Court of Appeals of South Carolina, there was a motion in arrest of judgment, on the ground that the grand jury who found the bill, and the petit jury who convicted the prisoner, were summoned by writs of venire without the seal of the court. The motion was

McGuire v. The People.

granted, and the judgment in this, as well as in three other cases in which the defendants had been indicted and tried by the same jurors, was arrested.

In a previous case, *The State v. Dazin*, (1 *Spears*, 211,) the prisoner was convicted of murder, and the same objection was taken, with the same result. I have not had access to the statutes of that state, but from what was said in the case of the *State v. Crosby*, (2 *Harper*, 90,) they provided for drawing the jury somewhat in the manner provided by the statutes of this state. It is said in that case, that the important object of obtaining an impartial jury is secured by the manner of drawing them, which is not affected or controlled in the least by the manner of summoning them; that the writ of venire was the authority of the sheriff, and, as the process of the court, merely secured the attendance of the jurors. (See also *State v. McElmundy*, 1 *St. Tr.* 33.)

The case of *Rogers v. Smith* and another, in the King's Bench, (1 *Ad. & El.* 772,) was a civil case, but particularly applicable to the point now in question. For it would scarcely be contended that less regard should be paid to errors of this kind in criminal than in civil cases, especially when life is involved. That was a writ of error *coram nobis*, and the error assigned was that there "was no return of the *distringas juratores* by the sheriff or other officer therein mentioned, nor any panel of the jurors returned and annexed thereto." In England, in the Queen's Bench, there are two writs issued; the *venire facias*, which is made returnable at the court at Westminster, and the *distringas juratores*, which is made returnable at court on a day therein named, unless sooner, &c.

The former of these writs the sheriff does not execute, but makes out a panel of the jurors and returns the names, (*Smith on Actions at Law*, p. 119.) Upon the issuing of the *distringas* to the sheriff, he summons the jurors whose names he has returned on the panel, and returns the same to the court with the panel annexed. In the case above cited, the error alleged was that the sheriff had made no return to the *distringas*, nor annexed thereto a panel of the jurors.

The Court of Queen's Bench reversed the judgment. Lord Denman, delivered the opinion of the court, and held that at common law, the want of a return or a defective return was error. (*See also Cro. Eliz.* 311; *ib.* 587; 3 *Buls.* 220; *Cro. El.* 509; 1 *Roll.* 295; *Hob.* 130; *Cro. Jac.* 188.)

It appears from the remarks of the author in Smith on Actions at Law, above cited, that the issuing of these writs is mere matter of form. He says, "in fact they are now little more than forms, for by 6 Geo. 4, C. 50, sec. 15, the sheriff is obliged to return the same panel of jurors for the trial of all common jury causes, instead of being allowed as he anciently was, to return any duly qualified persons he pleased; so that the opportunity for investigation is now given in another way, and any body may know long before the day of trial, the names of the jury specified in this panel." It will also be noticed by examination, that the English statute of amendments is much broader and more extensive than our statute of amendments, applicable to criminal courts. (*See also Beekman v. Rye, Cro. Eliz.* 587; *Rowland Case*, 5 *Rep.* 416; 3 *Buls.* 220; 5 *T. R.* 462.)

Upon the defect in the want of a venire for summoning the grand jury, it is not necessary to pass. Judge Nelson held in the Circuit Court of the United States, in the Jerry Rescue Cases, that our statute which takes away the right of challenge to the array of grand juries, had, by implication, taken away the right to raise the objection in any form. If an objection exists to the summoning of the jury, which, previous to our revised statutes, would be a good objection on a motion to quash, or upon a writ of error, and which might also be a good objection as a ground of challenge to the array, I do not clearly perceive how the taking away the rights of challenge to the array for such cause, would necessarily deprive the party of his other common law remedies.

It seems to me it would rather strengthen his right to avail himself of his other remedies. The right of trial by jury, as well as the exemption from being held to answer for crime, unless upon presentment of a grand jury, is the boast of the

McGuire v. The People.

common law, and is guarantied by the fundamental law of both the state and national governments.

That these juries should be composed of impartial and competent men, has been the constant care of both legislatures and courts during the whole history of the common law. And the citizen has not been compelled to rely alone upon the fidelity of public officers to secure this right, but he has always been allowed to watch the proceedings himself.

He has always been allowed the largest liberty in availing himself of any defect in the proceedings, or in any want of conformity to the prescribed forms of procedure. It is true that the legislature have removed many of these old land marks of the common law, have abolished many of those writs and processes, which were once deemed essential. Yet the courts are to follow the legislature and not anticipate its action. They should not by judicial decision, attempt to abolish those remaining requirements of the common law which the legislature have thought best to leave unmolested.

Suppose in drawing a grand jury under our statute, the clerk or some one else, should so arrange the ballots in the box that the names of persons hostile to the accused would most certainly be drawn. This would not under our statute be a cause of challenge to the array.

But is there no remedy for the accused in such case? The right of challenge to the grand jury is practically of little importance, for in many cases the accused has no knowledge that any proceedings are pending against him, until the indictment is found. But the right to object to the proceedings after the indictment is found, is one of the most important rights secured to the citizen.

The fair inference it seems to me to be drawn from the consideration of the whole subject, is, that the legislature took away the right of challenge to the array, for the reason that it was of no practical benefit, designing to leave all the other common law rights of the accused unimpaired. But it is not necessary in this case to place our decision on the ground of the want of process to summon the grand jury.

The People v. Chadwick.

We are satisfied that the objection in regard to the want of process for summoning the petit jury was fatal, and the judgment of the Oyer and Terminer, must be reversed.

We will award a *venire de novo*, but we think the safer course for the district attorney would be to procure a new indictment to be found.

GRIDLEY and W. F. ALLEN, JJ., concurred. HUBBARD, J., dissented.

Judgment reversed.

SUPREME COURT. Tioga General Term, May, 1854. *Crippen, Shankland, Gray and Mason, Justices*

THE PEOPLE vs. JOHN H. CHADWICK.

Where, in an indictment for forgery, under 2 R. S. 761, § 36, the intent charged is, to defraud the bank by which the counterfeit bills purported to have been issued, it is competent for the public prosecutor, on the trial, to prove by parol evidence, the existence of the bank and the fact of its issuing bills without producing an authenticated copy of its charter. The rule of evidence is the same, whether the intent charged be to defraud the bank or to defraud a third person.

The prisoner was indicted and convicted at the April term of the Court of Oyer and Terminer, in Chemung county, 1854, for having in his possession, with intent to pass the same, counterfeited bank bills, with intent to cheat and defraud the Commercial Bank, &c. On the trial certain exceptions were taken to the ruling of the court, which will sufficiently appear in the following opinion. The cause was removed into the Supreme Court by certiorari where the same was argued at the May term, 1854, by

D. S. Dickinson, for the prisoner.

Edward Quin, (Dist. Att'y of Chemung county) for the people

The People v. Chadwick.

By the Court, SHANKLAND, J.—The defendant was convicted at a late Oyer and Terminer held in Chemung county on an indictment for having in his possession false, forged and counterfeited negotiable promissory notes or bills, called bank bills, purporting to have been issued by the Commercial Bank, a corporation or company, lately located or doing banking business at Clyde, in the county of Wayne, in this state, and duly authorized for that purpose by the laws of this state, with intent to utter the same as true, with intent to defraud the said Commercial Bank, knowing the same bills to be forged, &c.

On the trial the district attorney proved the existence of said bank, by evidence, that there was such a bank in fact, keeping a banking house and issuing bills, which were passing as currency, &c. The prisoner's counsel, before such evidence was given, objected thereto, and contended that the people must prove the existence of the bank by producing an authenticated copy of its charter, because the indictment averred an intent to defraud the bank. The prisoner's counsel duly excepted to the decision; and the prisoner, having been convicted, brings the cause before this court, by certiorari. And now on the argument the prisoner's counsel mainly relies on the same objection and contends that the indictment, having averred an intent to defraud a corporation, its legal existence must be proved by the best evidence thereof, viz.: its charter or articles of association.

The case of *The People v. De Bow*, is cited as an authority in favor of the counsel's position. (1 *Denio*, 9.)

In that case, the defendant was indicted for having in his possession forged bank notes with intent to defraud the Bank of Warsaw. On the trial the defendant proved the existence of the Bank of Warsaw by proving the articles of association entered into by several individuals in pursuance of the act to "authorize the business of banking," by which the individuals proposed to establish a bank in the county of Genesee, by the name of the Bank of Warsaw. The association never went into operation or issued any bills. The defendant insisted that

The People v. Chadwick.

the act, under which the association was formed, was unconstitutional, because it was not passed by two-thirds of the votes of the legislature, and that the Bank of Warsaw was not a body capable in law of being defrauded. It will be perceived the precise question raised in that case was, whether the law was unconstitutional, and not, what is the *character* or *degree* of proof of the existence of a corporation required on a criminal trial where the intent is alleged to defraud such corporation. As the *only evidence* of the existence of the Bank of Warsaw was the unconstitutional act and the articles formed under it, and as the bank had never acted as such or attempted to exercise any of its franchises, it followed, necessarily, that there was no evidence of the existence of such a bank either *de facto* or *de jure*. It was not discussed in that case, therefore, whether proof of a corporation *de facto* was competent evidence of its existence or not. In the case at bar the precise question is, whether evidence of a bank *de facto*, by proof of its having a banking house, issuing bank bills which pass as currency and the exercise of the usual banking powers, is competent and sufficient evidence of its existence on a trial against the prisoner on such an indictment as this is.

In the absence of judicial authority I should hesitate to pronounce it sufficient, but if the principle has been settled, holding it competent and sufficient, I think we are bound to sustain the ruling in this case.

In *The People v. Caryl*, (12 *Wend. R.* 547) it was held that on an indictment for stealing foreign bank bills it was not necessary to produce the highest evidence of the existence of the banks, such as proof of the original charters or acts of the government incorporating the companies; but, proof that there were such banks *de facto* was sufficient. And so, as to the bills, it was not necessary to prove by positive testimony that the names subscribed to them were in the handwriting of the officers of the banks; but it should at least be proved by a witness familiar with the bills, that he believed them to be genuine. See also the case of *Johnson v. The People*, (4 *Denio R.* 364) where a like decision was made. So, in the case of

The People v. Chadwick.

The People v. Smith Davis, (21 Wend. R. 309) where the defendant was convicted of having in his possession counterfeit bank bills with intent to pass them, it was held that it was not necessary that the prosecution should produce and prove the charter of the Morris Canal company, the corporation purporting to issue the bill, and that it was enough to prove its existence by other evidences. Nelson, J., in giving the opinion of the court, says, "under the old law (that is, previous to 1830) the existence of the company as well as the genuine or counterfeit signature of the officers (as the case might be) was frequently involved in the issue; and it must have been so in the case of altered notes; and yet *secondary evidence*, such as the *acts and operations of the institution and the like*, have been invariably received at the Oyer and Terminer." It is true the court in that case go on to decide that under the Revised Statutes it was not necessary to prove the existence of a corporation from which the bill *purports* to have been issued, in order to bring the case within the statute, and that it is sufficient if the bill on its face *purports* to have been issued by an authorized company, yet I consider the first point above mentioned as the enunciated opinion of the court equally with the other.

The above cases establish the rule to be that where the crime charged is the having counterfeited bank bills in possession with intent to defraud third persons, it is competent to prove the existence of the corporation or company *whose bills are forged* by acts of user; and that the best evidence is not required. So, too, where the crime charged is stealing bank bills. Now, is there any reason for requiring higher evidence of the existence of the corporation, in a case where the intent is charged to *defraud the corporation*, than where the intent is to defraud a third person? It is said, yes; because if there is no such corporation the intent *charged* is not possible. But it may be answered, *true*, but if there is no such bank its bills can not be forged and therefore the whole crime is impossible. The legal answer is, that in both cases the existence of the corporation must be established in order that the crime may be

The People v. Chadwick.

possible and the same *kind* and *degree* of evidence that will be sufficient to establish its existence in one case will be sufficient in the other.

It would be singular, indeed, if as between the people and the prisoner, the whole nature and degree of evidence requisite to prove the *existence* of a corporation, should be changed, where the object is to convict of an intent to defraud a bank by means of forged bills on its own or another bank, and where the object is to convict of an intent to defraud by passing the said bills. I see no sound reason for a distinction of the kind contended for, and repudiate its existence.

The machine and materials for counterfeiting coin, &c., found in the prisoner's possession at the same time the counterfeited bills were, were properly received in evidence for the purpose of proving *guilty knowledge* of the prisoner, as to the bills, &c., in question.

The court was not in an error for refusing to charge as required by the prisoner's counsel that the jury must be satisfied the prisoner had the spurious bills with intent to pass them within the jurisdiction of this state in order to convict.

In my opinion the prisoner was legally convicted and sentence should pass against him.

The court concurred in the above opinion, and the prisoner was sentenced to the state prison.

SUPREME COURT. Kings General Term, January, 1855. *S. B. Strong, Rockwell and Dean, Justices.*

ERASTUS VAN ZANT pl'ff in error *vs.* THE PEOPLE def'ts in error.

It is not a misdemeanor, under the statute, for an innkeeper to sell spirituous liquors to be drank on the premises, on Sunday, to persons not lodgers or travelers.

This was a writ of error to the Court of Sessions of the county of Rockland. The plaintiff in error was indicted in the Court of Sessions of Rockland county for a misdemeanor. The first count of the indictment charged the keeping of a disorderly house. The second and third counts charged that the plaintiff in error, being an innkeeper, sold strong and spirituous liquors to be drank in his inn, to persons not lodgers or travelers, against the form of the statute, &c. The language of these counts is more particularly set forth in the opinion of the court. The plaintiff in error pleaded not guilty to the first count and demurred to the second and third counts, and the public prosecutor joined in demurrer. The court below gave judgment against the plaintiff in error on the second and third counts.

Andrew Fallon, for plaintiff in error.

I. Selling liquor on Sunday is not an indictable offence at common law, and is no where in the statute declared to be a misdemeanor.

II. The statute merely subjects the person offending against its provisions to a penalty of two dollars and fifty cents, to be recovered by the overseers of the poor of the town where the act is committed. (2 *R. S.* p. 83, § 68, 4th ed.)

III. All business was lawful on Sunday at the common law, and all acts which are not prohibited by the statute, or forbidden by the common law, may lawfully be performed on that day. (*Boynton v. Paige*, 13 *Wend.* 430; *Story v. Elliot*, 8 *Cow.* 27; *Sayles v. Smith*, 12 *Wend.* 57; 7 *Barnwell & Cress.* 232.)

IV. Where a new offence is created, the remedy prescribed by the statute must be pursued and no other. (*People v. Stevens*, 13 *Wend.* 341; *Clark v. Brown*, 18 *Wend.* 220; *Stafford v. Ingersoll*, 3 *Hill*, 38; *Renwick v. Morris*, 7 *Hill*, 576; *Almy v. Harris*, 5 *John.* 175.)

V. Where no penalty is imposed in the section of the statute prohibiting the doing of an act, nor in any other section or statute, the doing such act shall be deemed a misdemeanor. (2 *R. S.* 880, § 54, 4th ed.)

VI. There being a particular penalty prescribed for selling liquor on Sunday, and a particular remedy and method of proceeding pointed out in the section containing the prohibition, such method of proceeding must be pursued and no other. (1 *Russell on Crimes*, 50.)

A. E. Suffern, for defendant in error.

I. All disorderly inns or ale houses are public nuisances, and the keeping of such, when laid as a common nuisance, is an indictable offence at common law. (4 *Black. Com.* 167; *Hunter v. Com.*, 2 *Serg. & Raw.* 298.)

II. The selling of strong or spirituous liquor on Sunday in licensed inns or taverns, except in cases allowed by law, is, upon general principles, the subject of indictment at common law; in as much as it tends to a breach of the peace, disturbs public order, and is injurious to public morals. (1 *Russell on Crimes*, 46; 1 *Haw. P. C. c.* 5, § 1; 7 *Cowen*, 258, *People v. Smith.*)

III. The statute prescribing a penalty for selling strong or spirituous liquors on Sunday, except in the cases therein excepted, and the method of proceeding, does not create a new offence; and where a statute merely attaches a new penalty to that which was an indictable offence at common law, the prosecutor may pursue either remedy. (*Whart. Crim. Law*, 6; 3 *Hill*, 38)

Van Zant v. The People.

IV. The selling of strong and spirituous liquors on Sunday in a licensed inn or tavern, to others than those excepted by statute, constitutes or tends to constitute such house a disorderly house, and its keeper may be indicted for the misdemeanor; as such act from its nature prejudicially affects the proper observance of the sacred day, and the good order and morals of the community. (2 *Serg. & R.* 91; 1 *East P. C. c.* 1, § 1.)

V. Profanation of the Lord's day, or Sunday, is by a variety of statutes punishable, &c.; but it is also said to be indictable at common law, and there is a precedent of such an indictment against a butcher, in which he is charged to be a common sabbath breaker and profaner of the Lord's day, and for having, within certain times mentioned, kept public and open shop, and exposed meat to sale to divers persons unknown. (1 *East P. C. ch.* 3.)

DEAN, J.—The plaintiff in error, was indicted in the Rockland sessions, for keeping a disorderly house, and also for selling on Sunday, while a licensed inn keeper, strong and spirituous liquors to persons other than travelers or lodgers. To the count of the indictment charging the keeping of a disorderly house, he pleaded not guilty. To the other counts he demurred. The Court of Sessions held the counts, to which the demurrer was interposed, sufficient, and ordered judgment against the defendant, who brought a writ of error to this court. The first count demurred to is, that the said Erastus Vanzant being the keeper of an inn or tavern in said town of Ramapo, in the county of Rockland aforesaid, heretofore to wit: on Sunday the first day of May, in the year of our Lord 1853, and on divers Sundays between that day and the finding of this inquisition, and while the said Erastus Vanzant, was the keeper of such inn or tavern at Ramapo, willfully and unlawfully, and contrary to the provisions of the statute in such cases made and provided, did sell and dispose of strong and spirituous liquors to one Archibald Cooper, to be drank in the inn or tavern of the said Erastus Vanzant, the said Archibald

Van Zant v. The People.

Cooper then and there not being a lodger in such inn or tavern, and the said Archibald Cooper then and there not being a person actually traveling on said first day of May, and on the said divers other Sundays above mentioned, in the cases allowed by law; and other wrongs and misdemeanors then and there did, to the evil example of all others, in like cases offending against the form of the statute, in such case made and provided, and against the peace of the people of the state of New York, and their dignity."

The charge expressed in other language is that Vanzant being an innkeeper, sold on Sunday strong and spirituous liquors to Archibald Cooper, the said Cooper not being a traveler or lodger.

The second count is, "that the said Erastus Vanzant, being the keeper of an inn or tavern in the town of Ramapo aforesaid, heretofore to wit: on Sunday the first day of May, in the year of our Lord 1853, and on divers other Sundays between that day and the finding of this inquisition, and while the said Erastus Vanzant was the keeper of such inn or tavern at the said town of Ramapo, willfully and unlawfully, and contrary to the provisions of the statute, in such case made and provided, did sell and dispose of strong and spirituous liquors to divers persons, to the jurors unknown, to be drank in the inn or tavern of the said Erastus Vanzant, the said divers persons, to said jurors so unknown, then and there not being lodgers in such inn or tavern, and not being persons actually traveling on the said first day of May last aforesaid, and on the said divers other Sundays last aforesaid, in the cases allowed by law; and other wrongs and misdemeanors then and there did, to the evil example of all others, in like cases offending against the form of the statute, in such case made and provided, and against the peace of the people of the state of New York, and their dignity."

The charge here is that Vanzant, on different Sundays, sold strong and spirituous liquors to divers persons, other than lodgers and travelers.

Van Zant v. The People.

Both counts contain the allegation that Vanzant was an innkeeper, also that he did these acts contrary to the provisions of the statute, that the liquors sold were to be drank in the tavern of Vanzant, and that the persons to whom they were sold were not lodgers or travelers. This raises the question whether for an innkeeper to sell liquors to be drank on the premises on Sunday, to persons other than those excepted in the statute, is a misdemeanor.

Title IX, part 1, chap. xx, of the R. S. entitled "of excise and the regulation of taverns and groceries," provides that "all offences against the provisions of this title, shall be deemed misdemeanors, punishable by fine and imprisonment." But in no part of this title is there any prohibition against selling on Sunday; on the contrary, the license by the words of the statute allows the innkeeper "to sell strong and spirituous liquors and wines, to be drank in his house," and contains no language excepting Sunday from the general operation of the license: by this title therefore, it is not a misdemeanor to sell on Sunday.

Article eighth, of title VIII, part 1, chap. xx, of the R. S., entitled "Of the better observance of Sunday," provides that "no keeper of an inn or tavern, or of any alehouse, or porterhouse, or grocery, nor any other person authorized to retail strong or spirituous liquors, shall, on Sunday, sell or dispose of any ale, porter, strong or spirituous liquors, excepting to lodgers in such inns or taverns, or to persons actually traveling on that day in the cases allowed by law. Every person offending against this provision, and being thereof duly convicted, shall forfeit the sum of two dollars and fifty cents." There is no part of the statute which makes a violation of this section a misdemeanor. The general provision in reference to violations of statutes is, "where the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition or in any other section or statute, the doing such act shall be deemed a misdemeanor." The converse of this is equally true, that where there is a penalty provided for the violation of

Van Zant v. The People.

a statute, and neither that or any other statute declares it a misdemeanor, the party committing the violation is liable for the penalty only. A distinct penalty is provided for this offence; the mayor, recorder, or any alderman of a city, or a justice of the peace, may punish for all these violations, but no where by statute is the person offending against the provisions for the observance of Sunday declared guilty of a misdemeanor. As both these counts are clearly drawn for violations of the statute, I might leave this case here, but I have examined to ascertain whether at common law an innkeeper is indictable for selling liquor on Sunday, and am satisfied that the mere act of selling on Sunday, is no more an indictable offence than making a contract or selling a horse. But a person may do either, that is, he may dispose of horses or sell liquor, in such a manner as to be guilty of a misdemeanor at common law.

The Sabbath is a recognized institution. Whatever openly violates its sanctity and interferes with its proper and orderly observance, is indictable. A case is reported where a butcher was indicted for commonly keeping open shop and exposing meat to sale on Sunday. If an innkeeper chooses so far to disregard the proprieties of the day, as commonly to keep his house open, and publicly sell spirituous liquors to persons other than travelers and lodgers, so that inhabitants of the neighborhood are by that means induced to frequent his house and habitually congregate there to drink on Sunday, he is indictable and deserves a punishment quite as severe as one who sells without a license. But as the two counts of the indictment under consideration are both drawn under the statute, and are without the necessary averments to make an offence at common law, the plaintiff in error is entitled to judgment.

S. B. STRONG, J.—The second and third counts of the indictment, to which a demurrer was interposed, and upon which the judgment of the court below against the defendant was rendered, were against a regularly licensed tavern keeper, for selling spirituous liquors on the sabbath, to persons other than actual travelers or lodgers. No statute declares this to be a

The People v. Randolph.

misdeemeanor. The statute prohibiting it imposes a penalty of two dollars and fifty cents, and the statute declaring that the violations of statutory prohibitions shall be deemed misdemeanors, limits its application to cases where no penalty is imposed either in the same section containing the prohibition, or in any other section or statute. The maxim *inclusio unius est exclusio alterius* is peculiarly applicable to criminal cases. The judgment of the court below should be reversed.

Judgment reversed and judgment for plaintiff in error on demurrer.

SUPREME COURT. Erie General Term, February, 1855
Bowen, Marvin and Green, Justices.

THE PEOPLE vs. JAMES RANDOLPH.

Although, by the common law of England, a person under 14 years of age is conclusively presumed to be incapable of committing the crime of rape, in this state the presumption is not conclusive, and may be overcome, by showing that the party charged had attained to puberty.

So much only of the common law of England was in force in the colony, on the 19th day of April, 1775, as was applicable to our circumstances and condition.

The *principles* of the common law are the same under all circumstances; but its *rules*, or the results of the application of the principles, will vary with the facts to which it is applied, or the conditions under which the application is made.

The presumption of the incapacity of a person under 14 years of age to commit a rape can only be overcome by clear proof of capacity; and where, on the trial at the Oyer and Terminer, the presiding judge submitted to the jury the question of capacity, on evidence strongly suggestive of doubt, if not entirely reconcilable with innocence, and the jury found the prisoner guilty, the conviction was reversed and a new trial awarded.

This was a certiorari from the Orleans Oyer and Terminer, where the defendant was convicted of rape. On the trial before Mr. Justice Bowen, it was proved on the part of the prosecution by the complainant, a girl upwards of fourteen years of age, that in July, 1853, the prisoner violently assaulted and

The People v. Randolph.

threw her down upon the ground and with his private member penetrated her private parts; that the prisoner with two other boys, one fourteen and the other ten years of age, had followed the complainant and another girl to a field a considerable distance from her residence, and that while following her, he stated to the boys with him, that he was going to have connection with her. It was also proved by the mother of the complainant, that she examined her in the evening of the same day and found marks of violence on her shoulders and back and saw on her under garments at places below the knees of the girl, and on the back and front of her garment, several spots of a yellowish color which were dry. The prisoner gave evidence tending to prove that at the time of the alleged offence he was under fourteen years of age. The counsel for the prisoner requested the court to charge the jury, that if the prisoner was under fourteen years of age at the time of the alleged offence, he could not be convicted of rape. The court refused so to charge and the defendant excepted. The court charged the jury, that *prima facie* a person under fourteen years of age was incapable of committing the crime of rape, but if the prisoner had in fact arrived at puberty, he might be convicted although under fourteen years of age; that, if the evidence showed that he was at the time capable of emission, that was sufficient proof of puberty, and that the fact of his following the complainant when he saw her go into the field, with the avowed intent to have connection with her, was a circumstance which the jury might take into account as evidence on that question. The counsel for the prisoner excepted to this charge and requested the court to charge, that there was not sufficient evidence to establish puberty and actual capacity to commit the crime of rape. The court refused so to charge, and the counsel for the prisoner excepted. The jury found the prisoner guilty of rape, and also found, under the direction of the court, that the prisoner was at the time of the commission of the offence under fourteen years of age. Whereupon his counsel moved the court to direct a verdict of not guilty, which the court refused to do, and the counsel for the prisoner excepted.

The People v. Randolph.

Noah Davis Jr., for the prisoner.

B. L. Bessac, (District Attorney) for the people.

GREENE, J.—The proposition is neither disputed nor disputable that by the common law of England as it has been settled for several centuries, a person under fourteen years of age is conclusively presumed to be incapable of committing the crime of rape. The jury have found that at the time laid in the indictment the prisoner was under that age and have convicted him of this crime; and the question arises on this bill of exceptions, is the rule above stated a part of the law of this state. The counsel for the prisoner relies upon the 17th section of the first article of the constitution by which it is provided, among other things, that “such parts of the common law and of the acts of the legislature of the colony of New York as together did form the law of said colony on the 19th day of April, 1775, *shall be and continue the law of this state* subject to such alterations as the legislature shall make concerning the same.” By virtue of this provision it is claimed that the rule in question (which was, as we have seen, the settled rule of the common law as it was then administered in England) became, and has since continued to be, the law of this state.

It is apparent that this argument rests upon the assumption that all the rules of the common law in force in England at the time in question were also in force in the colony of New York, and of course, the soundness of the argument depends upon the truth of this assumption. The common law consists of those principles and maxims, usages and rules of action which observation and experience of the nature of man, the constitution of society and the affairs of life have commended to enlightened reason, as best calculated for the government and security of persons and property. Its principles are developed by judicial decisions as necessities arise from time to time demanding the application of those principles to particular cases in the administration of justice. The authority of its rules does not depend upon positive legislative enactment, but

The People v. Randolph.

upon the principles which they are designed to enforce, the nature of the subject to which they are to be applied and their tendency to accomplish the ends of justice. It follows that these rules are not arbitrary in their nature nor invariable in their application, but from their nature as well as the necessities in which they originate, they are and must be susceptible of a modified application suited to the circumstances under which that application is to be made.

The principles of the common law, as its theory assumes and its history proves, are not exclusively applicable or suited to one country or condition of society, but on the contrary, by reason of their properties of expansibility and flexibility, their application to many is practicable. The adoption of that law in the most general terms, by the government of any country, would not necessarily require or admit, of an unqualified application of all its rules without regard to local circumstances, however well settled and generally received those rules might be.

Its rules are modified upon its own principles and not in violation of them. Those rules being founded in reason, one of its oldest maxims is, that where the reason of the rule ceases the rule also ceases.

The language of the constitutional provision above quoted is, "such parts of the common law as were in force on the 19th day of April, 1775, shall be and continue the law of this state. The question is, what parts of that law were then in force here. With the exception of such parts as had previously received the direct sanction of legislative enactment, which is not claimed for this rule, the authority of the common law resulted from our colonial dependence upon England. Upon the principles already stated, so much only of the common law was in force in the colony by virtue of that relation as was applicable to our circumstances and condition. This proposition is also sustained by the highest authority. In treating of the countries subject to the laws of England, Sir Wm. Blackstone says, "it hath been held, that if an uninhabited country be

The People v. Randolph.

discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only *so much* of the English law as is *applicable to their own situation and the condition of an infant colony*, such, for instance, as the general rules of inheritance and of protection from personal injuries. (1 *Black. Com.* 107.) Chancellor Kent, (1 *Com.* 472,) lays down the same rule with regard to the extent to which the common law was applicable in the colonies, and of its subsequent adoption by the constitutions of the several states "the common law," he says "*so far as it is applicable*," "has been recognized and adopted as one entire system by the constitutions of Massachusetts, New York, New Jersey and Maryland. It has been assumed by the courts of justice, or declared by statute *with the like modifications*, as the law of the land in every state. It was imported by our colonial ancestors, *as far as it was applicable*, and was sanctioned by royal charters and colonial statutes." This apparently qualified adoption of the common law is, after all, nothing more nor less than an adoption of its essential *principles*, the application of which to our circumstances, would result in a modification or entire change of some of its rules, which are nothing more than the result of the application of general principles to particular facts. The *principle* is essentially the same under all circumstances, but the *rule*, or result of its application, will vary with the facts to which it is applied, or the conditions under which the application is made.

We have then only to consider the nature of this rule, and compare the facts and conditions in which it originated with those from which it is now sought to be deduced, in order to determine whether it does or *ever did* prevail in this state. It is a *mere rule of evidence*, a presumption of law arising upon a given state of facts. The principle of the law of presumptive evidence, is, that when experience shows a uniform connection or inconsistency between any two facts, upon proof of one of those facts, the existence or the absence of the other will be

The People. v. Randolph.

conclusively presumed, according to the uniform result of such experience. When the result of that experience is not universal but general, the presumption still exists, but applies with diminished force. In such cases it is not absolute, but *prima facie*.

The rule contended for by the prisoner had its origin in a country and at a time where males seldom if ever arrived at puberty before the age of fourteen years. Hence the rule was the natural result of the application of the above principle to that acknowledged fact. But it is a fact equally well, and I apprehend much better known, that in other races of men, and indeed in the same race, under the influence of different circumstances of climate and habits of life, this condition may be and is often developed at a much earlier period; and where this fact is known to exist, a modification of this rule of evidence seems to me to be the necessary result of the application of a familiar principle of law to the fact. No principle is thus violated, but the rule is changed by the *operation* of the principle.

I think it must be apparent to the most casual observation, that however well adapted this rule may be to the climate and population of the country where it prevails, the same circumstances render it equally inapplicable in this state, having a population composed of almost every variety of races and a climate as various as its population. It may still be true in many, perhaps in a majority of cases, that the condition of of puberty is not attained before the age of fourteen; but that this is universally true, or so nearly so as to justify an absolute presumption of the fact, can not be, and indeed is not claimed. We have seen that it can not be sustained upon principle as an arbitrary rule of universal application, and no authority has been found showing its recognition as such in this state.

In the case of *Williams v. The State*, (14 Ohio Rep. 222,) it was held that the rule as administered in England was not applicable in that state for reasons similar to those already suggested, that the presumption that an infant under fourteen years of age was incapable of committing a rape, might be rebutted by proof that he had arrived at puberty. I agree en-

The People v. Randolph.

tirely with the learned judge who delivered the opinion of the court in that case as to the soundness of the rule laid down by him, and the reasons by which it is vindicated; but I think as I have endeavored to show, that he has unnecessarily and erroneously assumed that the application of that rule involves any departure from "long established legal principles." It follows that the charge of the court below on this point was correct.

It was assumed at the trial and on the argument, that the condition of puberty was indispensable to the capacity of the prisoner to commit this crime, and that the fact must be proved in order to justify a conviction; and notwithstanding the provision of the revised statutes I am inclined to regard this presumption as the most reliable exponent of the results of general experience, and the rule founded upon it, as laid down at the trial as the only safe rule in such cases.

The question then arises, was the fact of puberty proved in this case? For the purpose of establishing this fact, the prosecution proved, that upon an examination of the complainant, the evening after the alleged offence, spots of a yellowish color were found on the back and front parts of her under garments below the knees. No evidence was given tending to show that these spots were actually produced by a deposit of semen, or that such appearances would naturally or probably be produced by such deposit, and it seems to me that the connection between such appearances and the alleged cause can rest upon nothing more tangible or rational than conjecture. It was also proved that the prisoner, in company with two other boys, followed the complainant into a field a considerable distance from her residence, and that while following her, the prisoner stated to the other boys that he was going to have connection with her. The court charged the jury, in substance, that this statement was evidence tending to show that the prisoner had arrived at puberty. With great deference, I must say, that I have not been able so to understand the tendency of this evidence, I can see no natural connection between this statement and the fact which the prosecution sought to infer from it. It seems to me quite as reasonable and natural to re-

The People v. Randolph.

gard it as the idle and thoughtless boast of a boy, who had no definite notions of the act of which he was talking, and as little capacity to commit it. Upon such evidence as this the conviction of a boy ten years old of this crime would be no impossible, and I might add, no improbable occurrence. The prisoner was proved to have been of an age when the law presumes him to be incapable of committing this crime, and it was the duty of the prosecution not only to meet but to repel this presumption by clear proof of his capacity. And if I am mistaken in supposing that no proof of this fact was given, still I can not but regard it as extremely dangerous to allow evidence so weak and inconclusive, so strongly suggestive of doubt, if not entirely reconcilable with innocence, to prevail against a presumption founded alike in reason and experience, so important to the protection of the innocent against unfounded prosecutions for the crime, the proof of which rests entirely with the complainant, and against which, when instigated by malice, cupidity or the temptations which disappointed, unregulated or vicious passion may suggest, even innocence is not always a sure defence. I have been forced, by the examination of this case, to the conclusion, that the learned justice who presided at the Oyer and Terminer, erred in the charge upon the point last mentioned, and also in submitting the case to the jury upon the question as to whether the prisoner had arrived at puberty at the time of the alleged offence. In my opinion this conviction can not be sustained without establishing a very dangerous precedent. The conviction must be reversed, and a venire de novo awarded. (a)

(a) On a subsequent trial the prisoner was convicted of an assault and battery only—*vide infra*.

SUPREME COURT. New York General Term, April, 1855.
Mitchell, Morris and Clerke, Justices.

THE PEOPLE *vs.* MICHAEL DONNELLY, impl'd with BEALES and al.

Where several persons are jointly indicted, one of them is not a competent witness for or against the others, without being first acquitted or convicted; and it makes no difference whether the defendants plead jointly or separately. An accomplice separately indicted is competent.

The defendant had been convicted partly on the testimony of a defendant jointly indicted with him without discharging such codefendant from the record.

CLERKE, J.—It is well settled and I believe never questioned in this state or in England, that where several persons are jointly indicted, one is not a competent witness either for or against the others, without being first acquitted or convicted; and it makes no difference whether the defendants plead jointly or separately; an accomplice, however, separately indicted is competent. Whether there is any good reason for this distinction, it is unnecessary to inquire on the present occasion.

Beales, although a joint defendant, was admitted as a witness against Donnelly in this case, without discharging him from the record.

The judgment should be reversed and a new trial ordered.

MITCHELL, J.—In 1 *Ryan & Moody*, 401, (*Rex v. Rowland and others*,) the counsel for the crown moved to have an acquittal against two of the defendants, that he might use them as witnesses. It was treated as necessary and allowed. (See also the note there.) So a case is stated in *Cases Temp. Hardwicke*, 163, where on an information at the suit of the crown, it was deemed necessary to enter a *nol. pros.* against one of the defendants before examining him against the others. Our own courts have decided that one defendant in an indictment can not be a witness for another; it can not be on the ground of interest, for

McCarron v. The People.

there is no interest either way; and if it be because he is a party to the record, it applies whether he be called for the people or his codefendants.

Judgment reversed and new trial ordered.

SUPREME COURT. Oswego General Term, April, 1855.

Pratt, W. F. Allen and Bacon, Justices.

JOHN MCCARRON pl'ff in error *vs.* THE PEOPLE def'ts in error.

It is not error for a Justice of the Supreme Court to preside at the Oyer and Terminer, during the year in which he is a Judge of the Court of Appeals.

Although he is a Judge of the Court of Appeals, he is also still a Justice of the Supreme Court, and may exercise all the powers and discharge all the duties of a Justice of the Supreme Court.

This was a writ of error to the Oneida Oyer and Terminer. The prisoner had been tried and convicted of murder in that court and had been sentenced to be executed. The indictment had been found in the Court of Sessions and sent to the Oyer and Terminer for trial. On the trial, which took place in October, 1854, the Hon. William F. Allen, one of the Justices of the Supreme Court presided, and passed sentence of death on the prisoner, after his conviction. During the year 1854 Judge Allen was a Judge of the Court of Appeals.

J. A. Spencer, for the plaintiff in error.

I. Courts of Oyer and Terminer can only be held by a Justice of the Supreme Court, the County Judge and the two Justices designated by law, or any three of them, of whom a Justice of the Supreme Court must always be one. (2 R. S. 377, § 9, 4th ed.)

McCarron v. The People.

II. The offices of "Judge of the Court of Appeals" and of "Justice of the Supreme Court," are distinct and separate offices, charged with duties alike distinct and separate; requiring the whole time of each officer for the proper discharge of his duties. Those "selected" from the Supreme Court are as much and exclusively Judges of the Court of Appeals, for the time being, as are those "elected" by the electors of the State. If neither of the four judges "elected" can discharge the duties of a Justice of the Supreme Court, then it is submitted that neither of the four judges "selected" from the class of Justices of the Supreme Court having the shortest time to serve, can discharge those duties.

They are *selected from, taken out of*, the Supreme Court, and placed in another court. Taken from one office and put in another — relieved from one duty and charged with another — shorn of one power and clothed with another.

"The Judges of the Court of Appeals and Justices of the Supreme Court shall not hold any other office or public trust." (*Const. art. 6, § 8.*)

"The court for the trial of impeachments shall be composed of the President of the Senate, the Senators, or a major part of them, and the Judges of the Court of Appeals, or the major part of them." (*Const. art. 6, § 1.*)

The judges "selected" are members of this high court.

"There shall be a Court of Appeals composed of eight judges, of whom four shall be elected by the electors of the state for eight years, and four selected from the class of Justices of the Supreme Court having the shortest time to serve." (*Const. art. 6, § 2.*)

Here is *one court*, created, constituted, composed of *eight officers*, forming one body, set apart by different methods, each equally efficacious, and producing the same things — court offices, officers for the same duty and object. How can any sensible distinction be made? This court is exclusively appellate in its jurisdiction; while the Supreme Court has general original jurisdiction in law and equity. (*Const. art. 6, § 3.*)

The seventh section of the same article provides for the com-

pensation of the Judges of the Court of Appeals and Justices of the Supreme Court. Suppose the law provided that the Judges of the Court of Appeals should annually receive \$3,500, and the Justices of the Supreme Court \$3,000, would any one say that the eight Judges of the Court of Appeals should not each receive an equal amount?

If they be at the *same time* Judges of the Court of Appeals and Justices of the Supreme Court, why are they not entitled to compensation in both? Why, would they not hold more than one office at the same time, in violation of the eighth section already cited?

The sixth section of the same article is somewhat obscurely worded, but it is submitted that the ellipsis, "who is not a Judge of the Court of Appeals," should be supplied in every following member of the section, and then its reading will be clear and consistent, and in harmony with all other provisions of the article. If this be not the true reading, then will be found the absurd provision, that an officer who has served the longest and has the largest experience, and at the same time fills another office of higher dignity, is to be presided over by a junior and inferior officer.

Suppose a Judge of the Court of Appeals "selected" from the Justices of the Supreme Court, should be removed by concurrent resolution of both houses of the Legislature, pursuant to the eleventh section of this article, would it not be from the office he filled at the time of the action of the removing power? It may be that the removal would be held to vacate both offices, but it is submitted that the record of such action would show him removed from the office of "Judge of the Court of Appeals" held at the time.

But little light is thrown upon the question involved by the legislation for the execution of the Constitution.

The fourth section of the Judiciary Act of 1847, (*Laws of 1847, p. 320,*) provides for the election of Judges of the Court of Appeals and their classification and term of office. The fifth section declares who shall be "chief judge." The sixth

McCarron v. The People.

section provides for the selection of four Justices of the Supreme Court every year, and that "*they shall enter upon their duties as Judges of the Court of Appeals on the first day of January, and serve as judges of said Court one year.*" And provides also that "six Judges of the Court of Appeals shall be necessary to constitute a quorum for holding any term of said court."

This legislation distinctly recognizes the four "selected" officers as Judges of the Court of Appeals and makes the presence of at least two necessary to its jurisdiction. It is certainly true that the class of men is small from which this "selection" is to be made, and that to be eligible they must hold a particular office; in other words, possess certain qualifications; but this involves no other principle than do the provisions of the United States Constitution prescribing the age and other qualifications for Representatives, Senators and President. When properly "selected," it is equivalent to an election, appointment, &c., and his powers and duties are exactly equivalent to those of the "elected" judges with a single exception—that of presiding in the court. He then holds an office, and can hold no other.

The fifteenth section of said act (p. 323,) provides for a presiding justice of the Supreme Court, and in the language of the constitution excludes one who is a judge of the Court of Appeals and other classes. Here, again, he is called a "*judge of the Court of Appeals,*" and it makes one of the next class a "justice having the shortest time to serve in that court," while the other is out of it.

It is, therefore, with great respect for the doubtful impressions and practice to the contrary, submitted that "*Judge*" Allen had no jurisdiction to hold the Court of Oyer and Terminer for the trial of the plaintiff in error, and that therefore the trial, conviction and judgment are void, and should be reversed.

H. T. Utley, (District Attorney,) for the people.

I. Any one of the justices of the Supreme Court, may hold courts of Oyer and Terminer.

“Any one of the justices of the Supreme Court may preside in courts of Oyer and Terminer in any county.” (*Const. Art. 6, § 6.*)

“Each justice of the Supreme Court shall have power to hold any Circuit Court, and to preside in any court of Oyer and Terminer in this state, either for the whole time for which such court shall continue, or for any part of that time.” (*2 R. S. § 4, page 376, 4th ed.*)

“Courts of Oyer and Terminer of the respective counties, except in the city and county of New York, shall be composed of a justice of the Supreme Court, who shall preside, and the county judge and the justices of the peace, designated as members of the Court of Sessions; and the presiding justice and any two of other officers above mentioned, shall have power to hold said court.” (*Sec. 38, ch. 280, 1847; 2 R. S. § 9, page 377, 4th ed.*)

II. The Court of Appeals shall be composed of eight judges, of whom four shall be elected by the electors of the state for eight years, and four selected from the class of justices of the Supreme Court, having the shortest time to serve. (*Const. art. 6, § 2.*)

“Four justices of the Supreme Court to be judges of the Court of Appeals, shall every year be selected from the class of said justices having the shortest time to serve; and alternately, first from the first, third, fifth and seventh judicial districts, and then from the second, fourth, sixth and eighth judicial districts, and shall enter upon their duties as judges of the Court of Appeals, on the first day of January, and serve as judges of that court one year.” (*Sec. 6, ch. 280, 1847; 2 R. S. § 5, pages 311-12.*)

In providing for justices of the Supreme Court, being “selected” to act as judges of the Court of Appeals, the constitution does not contemplate depriving the justices to be selected of their original jurisdiction as such justices, while acting as judges of the Court of Appeals. On the contrary, the consti-

McCarron v. The People.

tution expressly recognizes the judges of the Court of Appeals, selected from the justices of the Supreme Court, as being clothed with the power, and with a single exception, possessed of all the rights of such justices still, while acting as judges of the Court of Appeals.

“The state shall be divided into eight judicial districts. There shall be four justices of the Supreme Court in each district.” (*Const. art. 6, § 4.*)

“Provision may be made by law for designating from time to time, one or more of the said justices, *who is not a judge of the Court of Appeals*, to preside at the general terms of the said court, to be held in the several districts. Any three or more of the said justices, of whom one of the said justices so designated, shall always be one, may hold such general terms. And any one or more of the justices may hold special terms and Circuit Courts, and any one of them may preside in courts of Oyer and Terminer in any county.” (*Const. art. 6, § 6.*)

“The justice of the Supreme Court, in each judicial district, having the shortest time to serve, *and who is not a judge of the Court of Appeals*, nor appointed or elected to fill a vacancy in the first class, shall be a presiding justice in the Supreme Court.” (*Sess. Laws, 1847, ch. 280, § 15, as amended, 1848, ch. 170.*)

By the foregoing provisions of the constitution, the justices who are authorized to hold general and special terms of the Supreme Court and Circuit Courts, “and to preside in courts of Oyer and Terminer in any county,” are those whose number and whose elections are provided for in sections 4 and 12 of art. 6 of the constitution; and the only power taken from them as such justices, either by the constitution or statute law, is the right to preside at the general terms, while judge of the Court of Appeals. A justice of the Supreme Court, selected to be a judge of the Court of Appeals, does not “hold any other office or trust,” than that of such justice, while discharging the duties of a judge of the Court of Appeals.

Justices of the Supreme Court can not be divested of the power and authority conferred upon them by the constitution

McCarron v. The People.

and statute law, without some positive and affirmative enactment. Whenever any justice of the Supreme Court is selected to be a judge of the Court of Appeals, he is thus made such judge *ex officio*; and while serving in that court as one of its judges, he performs in fact, thereby, one of the duties of a justice of the Supreme Court.

Every justice, before he enters upon the discharge of the duties of his office, takes the constitutional oath required of him, which is to discharge the duties of the office of justice of the Supreme Court. And when such justice is selected to be a judge of the Court of Appeals, no oath is required of, or taken by him, as a judge of that court; but he acts in that court, under the constitutional oath taken by him, as a justice of the Supreme Court.

If he is taken out of the Supreme Court, and placed in the Court of Appeals, and thus made a judge of the Court of Appeals in fact, he would be required to take the constitutional oath of a judge of that court, before he entered upon the discharge of his duties as such judge. Again, if he were taken out of the Supreme Court, he could not be placed back, without being selected, appointed or elected.

Should the office of any Justice of the Supreme Court become vacant before the expiration of the regular term for which he was elected, and while acting as a judge of the Court of Appeals, the vacancy would be filled by the appointment of a justice of the Supreme Court for the unexpired term, and not by the appointment of a judge of the Court of Appeals. (*Const. art. 6, § 13.*)

If Justice Allen, who presided at the said court of Oyer and Terminer, became exclusively a judge of the Court of Appeals, when selected, his office of justice thereby became vacant, and might have been filled by appointment.

Again, had Justice Allen resigned the office of judge of the Court of Appeals, while acting in that court, it is submitted that such resignation would not have caused any vacancy in his office. The legislature regards the justices of the Supreme Court as such justices during the entire term for which they are

McCarron v. The People.

elected. It annually appropriates \$10,000 for salaries of four judges of the Court of Appeals, and \$82,500 for salaries of thirty-three justices of the Supreme Court; thus specifying the sum apportioned and the object to which it is to be applied, as required by the constitution. (*Const. art. 7, § 8; Sess. Laws, 1853, p. 417; id. 1854, p. 621.*)

The late court for the correction of errors consisted of the president of the senate, the senators, the chancellor and the justices of the Supreme Court. (2 R. S. 93, 2d ed.; 2 Wend. 218.)

Those officers did not lose the power or jurisdiction of the respective offices to which they were elected or appointed, on becoming members of the court for the correction of errors. Each continued to perform the duties of the office to which he was elected or appointed, while acting as a member of that court. The late constitution, under which they held their respective offices, prohibited the justices of the Supreme Court "holding any other office or public trust." (*Const. 1822, art. 5, § 7.*)

The court for the trial of impeachments is a court of record, having original jurisdiction not possessed by any other court in the state. This court is composed of the president of the senate, the senators, or a major part of them, and the judges of the Court of Appeals, or the major part of them. (*Const. art. 6, § 1; 2 R. S. 347.*)

The judges of the Court of Appeals, and the senators, become members of the court for the trial of impeachments, *ex officio*, in the same manner as the justices of the Supreme Court, selected, become judges of the Court of Appeals. The justices of the Supreme Court, selected, on becoming judges of the Court of Appeals, do not lose their original powers as such justices, any more than the judges of the Court of Appeals and the senators lose theirs, on becoming members of the court for the trial of impeachments.

The seventh section of article six of the constitution, provides that the judges of the Court of Appeals and justices of the Supreme Court, shall severally receive at stated times for their

McCarron v. The People.

services, a compensation to be established by law. It is submitted that by this provision the salary of judges of the Court of Appeals and justices of the Supreme Court, severally, must be equal in amount.

But suppose the compensation of judges of the Court of Appeals, could be and were established at \$3000, and of the justices of the Supreme Court at \$2500 annually. A justice of the Supreme Court, under such a law, would not be entitled to \$3000 for his services as judge of the Court of Appeals, any more than a judge of the Court of Appeals would be restricted to the compensation of a senator, which is \$3 per day, while sitting as a member of the court for the trial of impeachments.

The judges of the Court of Appeals, who are such in fact, are elected by the electors of the state; and without such election, or an appointment by the governor to fill a vacancy, a judge of the Court of Appeals can not be made.

“The judges of the Court of Appeals shall be elected by the electors of the state, and the justices of the Supreme Court by the electors of the several judicial districts, at such times as may be prescribed by law.” (*Const. art. 6, § 12 and 13.*)

It is therefore submitted that Justice Allen, who was a judge of the Court of Appeals, selected from the fifth judicial district, at the time of holding the court of Oyer and Terminer aforesaid, was in fact a justice of the Supreme Court by virtue of his election as such, and had jurisdiction to preside at said court of Oyer and Terminer; and the trial and conviction of the plaintiff in error by such court was valid.

By the Court, PRATT, J.—The constitution in creating and organizing the Court of Appeals, provides that it shall be composed of eight judges, four of whom shall be elected by the people directly, as judges of that court; and four shall be selected from the class of justices of the Supreme Court having the shortest time to serve. The judiciary act provides that the justices of the Supreme Court, selected to be judges of the Court of Appeals, shall enter upon their duties as such judges on the first day of January, and serve as such one year. It is

McCarron v. The People.

insisted on the part of the plaintiff in error, that during such year, the justice of the Supreme Court, thus selected, has no jurisdiction to perform any of the duties of a justice of the Supreme Court; that during the time he is authorized to act as judge of the Court of Appeals, his powers as a justice of the Supreme Court are suspended. I do not find any authority for this proposition, either in the constitution or statutes of the state.

First.—It is as justice of the Supreme Court, that he is entitled to act as judge of the Court of Appeals. To sit as judge of that court during the year designated by the statute, is as clearly one of the duties cast upon him as a justice of the Supreme Court, as to preside in a Court of Oyer and Terminer. The one is a court superior and the other inferior to the Supreme Court; but the constitution and statutes make it, nevertheless, the duty of justices of the Supreme Court, under certain circumstances, to act as judges in either court, and the performance of such duty does not suspend or impair their jurisdiction to perform the other duties which the law imposes upon them. Although judge of the Court of Appeals, he does not cease to be justice of the Supreme Court, with all the powers attached to that office, and amenable to the laws as such. His power to act as judge of the former court is one of the attributes of the office of justice of the Supreme Court. Suppose he should resign while thus acting as judge of the Court of Appeals? He could not resign that office, because that is not the office which he holds or to which he was elected, but simply a duty pertaining to his office. He must resign, if at all, the office of justice of the Supreme Court, and that would carry with it the right to sit as judge of the Court of Appeals. So, in filling the vacancy, the governor would not appoint a judge of the Court of Appeals, but a justice of the Supreme Court, and after qualifying as such, the appointee might take his seat in the former court.

Again: he could not be impeached as judge of the Court of Appeals. He might as well be impeached as a judge of a court of Oyer and Terminer. If impeached at all, he must be

impeached as a justice of the Supreme Court, although the particular dereliction in office specified might be mal-conduct as judge of the Court of Appeals or as judge of a court of Oyer and Terminer.

In fine, he takes the oath of office as justice of the Supreme Court, receives his salary as such, and all the powers and duties conferred upon him, in whatever court to be performed, are powers and duties appertaining to that office. They rest upon him so long as he holds that office, and no longer; and I do not perceive how the discharge of the one affects the jurisdiction to discharge the others. They are simply an accumulation of duties cast upon a class of public officers by the law, somewhat various and diversified in their nature and character, but not necessarily inconsistent with each other.

Secondly.—The language of the constitution, prescribing the various duties of Justices of the Supreme Court, raises a strong implication that it was not the design of the framers of that instrument that their ordinary powers should be suspended while acting as judges of the Court of Appeals: "provision may be made by law for designating, from time to time, one or more of the said justices, who is not a judge of the Court of Appeals, to preside at the general terms of the said court to be held in the several districts. Any three or more of the said justices, of whom one of the said justices so designated shall always be one, may hold such general terms. And any one or more of the justices may hold special terms and Circuit Courts, and any one of them may preside in courts of Oyer and Terminer." (*Constitution, art. VI. sec. 6.*)

By this section, the presiding justices at general terms in the Supreme Court, are not to be judges of the Court of Appeals; but no restriction or limitation is imposed in regard to the performance of any other duty. "Any one of them may preside in courts of Oyer and Terminer." The broad terms here used in connection with the restriction in regard to the justices who are to preside at general terms, precludes the idea that the same restriction was designed to be extended to jus-

McCarron v. The People.

tices presiding in courts of Oyer and Terminer. *Expressio unius est exclusio alterius.*

Thirdly.—This limitation of power is clearly not found in the general scope of the constitution, as developed in the powers and duties appertaining to other judicial officers. The judges of the Court of Appeals are also judges of the court for the trial of impeachments, when that court is in session; yet they do not, while acting as judges of the latter court, lose any of their powers as judges of the former court. Neither do the senators, while acting judges of that court, cease to be senators.

County judges are not only judges of the County Courts, in their respective counties, but they are judges in the courts of Oyer and Terminer and of Sessions in their counties, and in some counties surrogates. The discharge of judicial duty in one court, by no means suspends their power to act as judges of other courts.

An example, still more analagous, may be found in the selection of justices of the peace, through the medium of an election to act as judges of the courts of Oyer and Terminer and of Sessions in the several counties. Although, by this selection, they become in name and in fact, judges in those courts, still their power to act as justices of the peace and to hold justice's courts, is not thereby suspended. Various other examples might be cited, both under the old constitution and the new, of judicial officers being required to act as judges in different courts; but I have been unable to find any case in which the performance of duty in one capacity, suspends the power to act in others, in the absence of any special provision limiting their powers.

It is evident, therefore, that a justice of the Supreme Court, while a judge of the Court of Appeals, is not deprived of his jurisdiction to preside in a court of Oyer and Terminer, or to discharge any of the ordinary duties appertaining to that office. The judgment of the court of Oyer and Terminer must be affirmed.

ORLEANS OYER AND TERMINER. May, 1855. Before *W. F. Allen*, Justice of the Supreme Court, *Curtis*, County Judge, and the Justices of the Sessions.

THE PEOPLE *vs.* BENJAMIN MOSHER.

Bigamy is not punishable as an offence against this State, unless the second marriage took place within the territorial limits of this State.

Where the prisoner married a wife in Pennsylvania and lived with her in that State for several years, and then left her and went to Canada, and there married another woman and came to reside with her in this State, his wife being still living in Pennsylvania, it was held that the bigamy complained of was not an offence against the laws of this State and the prisoner was acquitted.

The statutory provision (2 R. S. 688, § 10) merely regulates the venue or place of trial, and does not enlarge the jurisdiction of the State courts.

The prisoner was indicted for Bigamy. The facts alleged in the indictment were that Mosher married a wife in Pennsylvania and lived with her in that state for several years and left her and went to Canada and there married another woman, his wife being still living in Pennsylvania. After his second marriage in Canada he came to Orleans county and resided there.

J. S. Smith, for the prisoner, claimed that he was entitled to an acquittal for the reason that no offence against the laws of this state was charged.

B. L. Bessac, (District Attorney) *contra*, insisted that by statute the offence was recognized as a crime against the laws of a place where the party was apprehended, and relied upon 2 R. S. 688, § 10.

THE COURT held that the laws of this state had no extra territorial force, and that the second marriage in Canada was not therefore an offence against the laws of this state; and although the marriage was void by the law of the place where it was entered into, the subsequent cohabitation of the parties within this state was merely an offence against good morals,

The People v. Mosher.

but was not indictable as a crime. The marriage being void, the parties were living together in a state of adultery, which was not recognized as a crime punishable by indictment under our laws. That the law against bigamy was not only to preserve the public morals, but it was made criminal, in order to protect the innocent party against the wiles of the guilty and this state owed no duty and could afford no protection to the subjects of a foreign state dwelling and remaining within the territory of their own government.

The statutory provision, to the effect, that an indictment may be found against any person, for a second or other prohibited marriage, in the county in which such person shall be apprehended, and like proceedings had as if the offence had been committed therein, merely regulates the venue or place of trial, and does not enlarge the jurisdiction of the State courts, or give them cognizance of offences committed without the state. It presupposes an offence to have been committed within the state against the laws of the state and regulates the place of trial.

The statute which defines the jurisdiction of criminal courts (2 R. S. 697, § 1) restricts their jurisdiction to offences and crimes committed within the boundaries of the state. (1 R. S. 65, § 1.) An attempt of the legislature to subject individuals to trial and punishment within this state, for acts done without the territorial limits of the state would be fruitless and the legislation designed to accomplish the purpose would be simply void.

The defendant was acquitted.

SUPREME COURT. Monroe General Term, December, 1854.
Johnson, T. R. Strong and Welles, Justices.

THE PEOPLE *vs.* SAMUEL MILLER.

On the trial of an indictment for obtaining an endorsement of a note by false pretences, it is proper for the prosecutor to state, as a witness, what influence the representations of the defendant had upon him, by way of inducing him to endorse the note.

Where, on such trial, it had been charged in the indictment and was proved on the trial, that the defendant obtained the endorsement by representing, among other things, that all his last year's debts had been settled and paid, it was held that such representations could not be shown to be false, by proving a specific indebtedness existing at the time, unless the existence of such specific indebtedness had been alleged in the indictment.

On the trial of an indictment in the Court of Sessions, the County Judge, presiding at the trial, can not be sworn and examined as a witness; he can not act at the same time in the capacity of both judge and witness. (a)

Certiorari to Monroe County Sessions. The defendant was tried and convicted in the court below for obtaining the signature of one Nelson Peet as endorser thereof to a promissory note made by the defendant, dated August 26th, 1851, payable to said Peet or order at the Farmers' and Mechanics' Bank, in the city of Rochester, at sixty-three days for one thousand dollars, by false and fraudulent pretences.

The pretences charged were, that the defendant had not any notes in bank except two several promissory notes for the payment of one thousand dollars each endorsed by the said Peet, *innuendo*, &c., and that all his last year's debts,—(*innuendo*, all the debts contracted by the said Samuel Miller in his business of milling during the year previous to said 26th of August, 1851,) were settled up (meaning thereby, paid) and also that he, the said Samuel Miller, was then solvent, well able to pay all his debts, and also then had the means and was fully able to pay the said promissory note first mentioned; and that Peet, believing these representations, was thereby induced to sign

(a) One of three referees, before whom a cause is tried can not be sworn and examined as a witness on the trial. *Morss v. Morss*, 11 Barb. S. C. Rep. 510.

The People v. Miller.

the said note as endorser thereof. The negations of these representations were that the defendant was at the time they were made, to wit: on the 26th day of August, 1851, and for a long time previous the sole maker and liable to pay besides the several notes mentioned two several promissory notes in and held by the Farmers' and Mechanics' Bank of Rochester, one for the payment of \$2000 and the other for \$500.

That all of the debts contracted by the defendant in his business of milling during the year previous to said 26th of August, 1851, were not at the time, &c., settled up and paid, but on the contrary said defendant at the time, &c. (26th of August, 1851) owed a large amount of debts contracted by him during the year preceding the 26th of August, 1851, to wit: the two several notes of \$2000 and \$500 before set forth, and also a large amount, to wit: \$900, to one Thomas Stratton, &c., all of which debts were contracted by defendant in his business of milling during the year preceding the 26th day of August, 1851, &c.

That said defendant was not at the time, &c. (26th of August, 1851) solvent, nor able to pay his debts, but on the contrary, &c., was utterly and wholly unable to pay his debts, and utterly and wholly insolvent, &c., &c.

That the defendant well knew the said representations to be utterly false and untrue at the time of making the same by means of which he obtained the signature of said Peet as endorser, &c.

There were two counts in the indictment, but substantially alike.

Upon the trial in the court below evidence was given in support of the indictment and on the part of the defendant various objections and exceptions were taken, which it is unnecessary to state, as the following opinion states enough of the proceedings for the right understanding of the points decided.

S. Matthews, for defendant.

E. A. Raymond, (District Attorney) for the people.

The People v. Miller.

By the Court, WELLES, J.—The note in question, the endorsement whereof by the prosecutor, Peet, is charged to have been obtained by false and fraudulent pretences, was made and endorsed for the purpose of renewing a previous one of the same amount endorsed by the prosecutor, and was so stated and understood at the time it was endorsed; and the bill of exceptions shows it was so used and appropriated. It may be questionable whether such a case comes within the spirit and object of the statutes to punish false pretences. The prosecutor's liability was not increased by the transaction, and it may be difficult to perceive how he could be injured by it, or that the defendant thereby intended to commit a fraud upon him. I do not, however, propose to place the decision of the case upon that ground.

The witness, Peet, testified, that he was induced to endorse the note by the defendant's statement to him that he was good; that he had paid all his debts; that he had property and means that he could pay him with; that he could pay the notes, and had money and property that he would and could pay him with. This evidence was objected to in season, and an exception to the decision of the court admitting it, was duly taken. We do not perceive any legal objection to this ruling. It was proper for the jury to know what influence the representations of the defendant had upon the witness by way of inducing him to endorse the note. If they had none at all, the prosecution must have failed on that ground; for although the representations were false and fraudulent, if they had no influence upon the mind of the witness, it could not be said that he was induced by them to endorse the note; which was indispensable to the consummation of the crime charged.

Amongst other evidence given by the district attorney upon the trial, was that of the witness, Nathan Calhoun, who testified that during the spring and summer of 1851, he sold the defendant a quantity of wheat, and that on the 26th of August of that year, the defendant owed him a balance for the wheat delivered, of \$790.81: This evidence, when offered, was duly objected to and an exception duly taken to its admission.

The People v. Miller.

Among other grounds of objection specified was the one that no such debt was mentioned in the indictment. It could only be material by way of contradicting the representation charged and claimed to have been proved that all the defendant's last year's debts had been settled and paid. If admissible at all, it could only be so, under a proper allegation or averment, alleging the fact. It would be contrary to well-established principles, to allow evidence to be given upon a material issue, tending to fasten fraud and falsehood upon the party, without any averment or notice in the indictment, of the fact sought to be proved. Indeed, this seems to have been the view entertained by the district attorney in drawing the indictment; for we find that it alleges an indebtedness of the defendant in favor of one Stratton, under which evidence was given. The same particularity is also observed in the negation of the representations charged respecting notes given by the defendant other than those endorsed by Peet. It seems to me they were necessary in those cases in order to authorize the evidence given in support of them, and equally so in regard to the evidence under consideration.

In the course of the trial, the defendant offered as a witness in his behalf the Hon. Harvey Humphrey, county judge of Monroe county. It was objected on the part of the prosecution that Judge Humphrey, being a member of the court, could not be sworn as a witness. The objection was sustained, and the defendant excepted. We think this decision was correct. The court could not be held without the county judge, and it would have broken up the court for the time being for him to take his stand as a witness. He could not act in the double capacity at one and the same time of judge and witness. To make this apparent, it is only necessary to suppose a claim of privilege by the witness in regard to answering a question put to him, or his refusal to answer a question which his associates of the court decide he is bound to answer, with a motion for his commitment, as being in contempt, until he should answer, or of evidence introduced to contradict or im-

The People v. Benjamin.

peach him. Such things are possible in the nature of the case.

If it should be said that the defendant might in this way be deprived of valuable evidence and exposed to a conviction for want of it, it is sufficient to say, that the indictment might be removed to the Oyer and Terminer for trial; and if the presiding judge on the trial in that court was a material witness, it might be good ground for an adjournment until a judge should take his seat who was not wanted as a witness.

Upon the ground, however, of the admission of the evidence of the witness Calhoun, without noticing any of the other objections raised upon the trial, we think the conviction should be reversed and a new trial granted in the court below.

Ordered accordingly.

SUPREME COURT. Albany General Term, May, 1855. *Parker, Wright and Harris*, Justices.

THE PEOPLE vs. WARREN BENJAMIN.

On a trial for an assault and battery before a court of Special Sessions, a former trial and sentence can not be given in evidence under the plea of *not guilty*. Under the plea of *not guilty*, the defendant can only give in evidence whatever negatives the allegations in the indictment or complaint, and matters of excuse or justification.

Where, after pleading *not guilty*, any thing occurs available as a defence, the defendant can only avail himself of it by a subsequent plea.

A conviction before a court of Special Sessions must be proved by the record of conviction, or a duly certified copy thereof, if a record has been filed; and secondary evidence of a conviction can not be received, unless it is shown that no record of conviction has been filed.

Forms of a writ of *certiorari* to bring up the proceedings and judgment from a court of Special Sessions, and of *return* thereto, and of *warrant* to bring the accused before a magistrate.

This was a *certiorari* to a court of Special Sessions. The writ of *certiorari* was as follows:

The People v. Benjamin.

The People of the State of New York, to Daniel C. Stewart, one of the Justices of the Peace in and for the County of Albany, Greeting:

We having been informed that Warren Benjamin, of said county, was lately, in a court of Special Sessions held before you, convicted of having assaulted and beaten William H. Smith, and being willing for certain causes to be certified of the said conviction, and of the complaint, proceedings and judgment against the said Warren Benjamin, do command you that the said complaint, proceedings, conviction and judgment, with all things touching the same, by whatsoever name the party may be called therein, you send to our justices of the Supreme Court distinctly and plainly under your hand and seal, and that you cause this writ and the affidavit delivered to you herewith and your return, to be filed in the office of the clerk of the Supreme Court at the city of Albany, within twenty days after the service of this writ. Witness, Samuel L. Selden, Esq., Justice, the 12th day of April, 1854.

R. HARPER, *Clerk.*

PETER JOHNSON, *Att'y.*

The above writ of *certiorari* is allowed by me this 12th day of April, 1854.

SAMUEL L. SELDEN,

Justice of the Supreme Court.

The application for the writ of *certiorri* was made on the affidavit of William Benjamin, who stated that he was the father of Warren Benjamin, in whose behalf the application was made, that said Warren Benjamin could not make the affidavit himself, as he was then imprisoned in the Albany Penitentiary, on the sentence which it was the object of the *certiorari* to reverse. The affidavit contained a history of the proceedings and trial before Daniel C. Stewart, justice of the peace, and a statement of the points made and relied upon to show the proceedings to be erroneous, and also the exceptions taken at the trial in the court below.

The return of the justice was as follows:

The People v. Benjamin.

State of New York, Albany County :

I, Daniel C. Stewart, the justice named in the annexed writ, do certify and return to the Supreme Court, that Warren Benjamin of said county, was on the 17th day of February, 1854, brought before me by virtue of a warrant hereunto annexed marked A, which was issued on a complaint made by William H. Smith on oath, I acting as a court of Special Sessions, read over the said complaint as stated in said warrant to the said Benjamin, to which he pleaded *not guilty*, the plea was duly entered by me in the minutes of the court, the said Benjamin then stated that he was not ready for trial, and made application for an adjournment until the 24th of February, at 9 o'clock A. M., which application was in accordance with the provisions contained in the 2d section of an act to amend the revised statutes in relation to courts of Special Sessions, and to regulate the police in the town of Watervliet, passed April 2d, 1850, allowed, the said Benjamin filing with me, the said justice, a bond in the penalty of three hundred dollars with William Benjamin surety as conditional for the personal appearance of the said Warren Benjamin, at a court of Special Sessions, to be held by me on the 24th day of February, at 9 o'clock in the forenoon, to answer said charge, or on a subsequent day to which said trial should be adjourned, which bond was duly approved by me, and is hereto annexed marked B.

February 24th, 9 o'clock A. M., defendant Benjamin appeared with his counsel Peter Johnson, court held open until 4 o'clock P. M., when defendant was sworn on application for adjournment to March 17th, at 9 o'clock A. M. March 17th, 9 o'clock A. M., adjourned to March 18th, A. M., 9 o'clock. March 18th, at 9 o'clock A. M., defendant appeared and was sworn on application for adjournment to April 1st, 9 o'clock A. M. April 1st, 9 o'clock A. M., defendant appeared, Andrew Alexander, Attorney for the People, made application for an attachment for Martin King, a defaulting witness, whereupon I issued an attachment returnable, April 8th, at 9 o'clock A. M., to which time said trial was adjourned. April 8th, 9 o'clock A. M. defendant, complainant and witnesses appeared. Defend-

The People v. Benjamin.

ant stated he was ready for trial whereupon, William H. Smith, the complainant, was duly sworn and testified as follows: I reside in West Troy; know defendant Warren Benjamin; he is or was a resident of West Troy recently. On the night of the 16th of Dec. last, he grievously assaulted and beat me; made an attack on me on the covered bridge near the West Troy side cut; it was between 12 and 1 o'clock at night; I was not alone; my mother, Miss Hill, my sister, two young men and two young women of Schenectady were with me; defendant was with some five or six others; I had been to Troy and was returning home; my sister lives some ten or fifteen rods from the bridge; after the attack on the bridge, myself and those with me fled to mother's house; defendant and those with him came, rushed into the house, threw me down and kicked and struck me; some one of them said drag the damned son of a bitch out of the house and kill him; they dragged me out; defendant and John Dunn kicked me in the face several times, when at the canal bridge, they tried to throw me off the bridge into the canal; I could not tell whether the defendant tried to or not, as I could not see all behind me; heard them say "throw the son of a bitch off the bridge."

Cross-examined.—I have been married; can't say whether my wife is living or not; do not know where she is; have not seen her for some six years; we broke up keeping house at that time; I am a son of Miss Hill; did not board with her at the time of the affray; I boarded at the widow Potter's; I remained at my mother's some days after the fracas, and finally went to my boarding place; we had been to Troy that night; I went there after my mother and sister, they wanted me to come home with them; they were at a dance at Mr. McCoy's; when coming home, the ladies from Schenectady were with us; I think I saw defendant at the dance that night; I understood that the dance was got up for the benefit of my mother; defendant and Dunn came with us from the east end of the Troy bridge; can't say that any angry words or threats of violence were used by them towards me, until we arrived at the covered canal bridge in West Troy; the fight commenced about one

The People v. Benjamin.

third the length of the bridge from the west end; can't positively swear that defendant struck me at the bridge; can't swear that he did not; the first time I can swear that defendant laid violent hands on me was after they pulled me out of the house; and don't know which ones pulled me out except John Dunn; defendant kicked me several times in the face, and injured me so that my face was swollen all over; he kicked me three or four times; the top of my head was cut through the scalp very severely; it had to be sewed up; this wound was made in the house; defendant was not in the habit of going to my mother's house that I know of; several persons had hold of me while on the walk beside defendant; defendant had not committed an assault and battery on me previous to Dec. 16, 1853; have no recollection of speaking to defendant before that time; I knew him by sight; he has not assaulted me since; the one on the 16th Dec. 1853, is the only one he ever committed on me; don't recollect that I ever swore in court that the fight was commenced at the bridge by defendant and continued to the house; can't swear that I did not swear so; I think that I did not swear so before Esquire Winne; when I went to McCoy's where the dance was, I went up some three or four streets, then went some distance up a hill; think it was not a brick house; it was on the left side of the road going east.

Question.--Do you recollect of giving in your testimony some two or three weeks ago, on a Saturday evening, before Justice Winne in regard to an assault and battery on you?

This question was objected to by the people's counsel on the following grounds:

I. That it is irrelevant and not material to this issue to inquire what witness swore to before Justice Winne, some two weeks since.

II. That this defendant had been arrested on the 17th of February, by virtue of a warrant regularly issued by this court and brought into court, arraigned and plead not guilty to the charge, and gave bail for his appearance at trial, and that any subsequent arrest and trial could have nothing to do with this

The People v. Benjamin.

issue, as the jurisdiction of this court could not be ousted or affected by such subsequent proceedings.

Defendant's counsel then stated his only object in examining witness in regard to what he swore to before Justice Winne, to be the laying of the groundwork for contradicting and impeaching the witness.

Examination on that point allowed for purpose of impeaching witness.

Ruling of the court excepted to by the people's counsel.

Answer.—I do, I had been subpoenaed there; I think it was about eight o'clock in the evening when I was sworn; defendant was there; they called it a trial; I suppose it was a trial; don't know whether Esquire Winne called it a trial or not, on that evening; I swore that defendant kicked me some three or four times in the face; I think that I did not at that time say any thing about the fight at the bridge; think that I did not say that the fight commenced at the bridge, and continued to my mother's house. I think I heard Justice Winne say that Warren Benjamin was arrested and brought into court for an assault and battery committed on me in December last; Winne asked Benjamin what he had to say, guilty or not guilty; I think Benjamin said not guilty; I was sworn after that. Esquire Winne asked me what Benjamin did to me; I answered that he kicked me three or four times in the face, down at the house; I think it was all that I swore, to the assault and battery; what I then swore to is the same that I swore to here; I left immediately after being sworn. I swore on that occasion that defendant kicked me three or four times in the face on the night of the sixteenth of December last; I left McCoy's about 12 o'clock, the night of the dance.

Direct examination resumed.—At the time I went before Esquire Winne, on the Saturday evening spoken of, I did not go voluntarily, I was subpoenaed; I do not recollect that I ever made a complaint against defendant before Esquire Winne for an assault and battery; I did not authorize any person to make a complaint for me. Defendant was then on trial before this court for the same offence, that he had been arrested for, brought into court,

The People v. Benjamin.

arraigned plead not guilty, and gave bonds for his appearance for trial on said charge; on the Saturday evening spoken of, Mr. Alexander, my counsel, objected to my swearing on that occasion, for the reason that the same matter was being investigated before this court, and Mr. Alexander also informed Esquire Winne that I had made no complaint before him, Esquire Winne, and did not wish to make one; did not wish to testify against defendant, to prosecute him before him; this was done before I was sworn. The court compelled me to testify, notwithstanding my unwillingness; I simply stated in as few words as possible what had been done; I was not cross-examined; Esquire Winne asked me the questions. I left the court immediately after I testified; don't know what occurred after I left; defendant's father, William Benjamin, and Peter Johnson, defendant's counsel, were there. No one seemed interested in the matter on the part of the people, except Esquire Winne; I would not have gone before Esquire Winne on that occasion if I had not been subpoenaed, and would not have testified had I not been compelled to.

Cross-examined.—I mean that Esquire Winne handed me the book and told me to swear; he did not threaten to commit me for contempt.

Ann Hill, sworn on part of people, and testified as follows: I know defendant, Warren Benjamin; William H. Smith, complainant, is my son; I was in company with him on the evening of the 16th December last; two ladies and two gentlemen were with us; when about two thirds across the canal bridge in West Troy, I heard John Dunn say that there was going to be a fight, and he wanted a hand in; John Collossy put out his foot to stop our passing on the sidewalk of the bridge; my daughter said. "take your foot away, let us go along, and mind your own business." William H. Smith then said he wished they would let the women pass and behave themselves; defendant; Benjamin, then reached over Dunn's head, struck at Smith's and knocked his hat off; Dunn then caught Smith by the hair and knocked him in the face; I got Smith's hat and we started, I ran to Mr. Busby's for help, Busby and his wife came, and

The People v. Benjamin.

the rowdy party on the bridge ran; we then went to the house and I went for Andrew Morrison, a constable; the crowd had rushed into the house and broken the door; soon after I came back with Morrison, the crowd had left the house; we went in and found my son, William H. Smith, badly cut, bruised and bleeding.

Cross-examination.—The ball at McCoy's was given for my benefit; I have done a great many hard day's work for McCoy; his house is in the city of Troy, and is called the United States Hotel; defendant was there at the dance that evening. McCoy's house is in Hoosic street, a short distance from River street in Troy. The dance was in a house opposite the United States Hotel.

Catharine Busby, was then sworn on part of the people, and testified as follows: I know the fracas spoken of; I was in bed with my husband on the night of the 16th of December last; we heard a man hallooing murder; we started to go down to the bridge; we saw persons running away; saw women there; saw Miss Hill there and Mary; she was hallooing murder; I went to Miss Hill's house; saw several, say four or five boys or young men breaking into the door and glass; I recognized Maloy's boy, John Dunn and Warren Benjamin, the defendant; I went as far as the door; saw Benjamin standing just in the door; the crowd all went in; saw Colossy strike Smith; he also struck me; I did not see Benjamin strike Smith while I was in the room; this was between twelve and one o'clock in the night; the boys were threatening to throw some person into the canal when at the bridge.

The people's counsel here rested.

Martin Winne, was then sworn on behalf of the defendant Benjamin, and testified as follows: I am a justice of the peace in and for the county of Albany; I know William H. Smith and Warren Benjamin; I went to Smith's house; he was so badly hurt that he could not get out of bed; he was the worst looking man I ever saw; I thought he would die. Miss Hill, Smith's mother, came to me, said that Smith was about to die, and that she wanted his examination taken before he died.

The People v. Benjamin.

Smith then made a statement, charging Warren Benjamin and others with having assaulted and beaten him; this was on the morning of the 16th December, 1853; he made the statement under oath; I issued a warrant for Benjamin's arrest on the 19th of December, 1853.

Question.—Did you try Benjamin for that offence on the 25th day of March, 1854?

Objected to by the people's counsel on the following grounds:

I. That it was not material whether witness had tried Benjamin on that day or not, as that arrest and trial took place more than a month after defendant had been arrested and brought before this court, on a warrant regularly issued and was arraigned, plead not guilty and gave a bond for his appearance for trial, and to all intents and purposes was on trial before this court and that this court could not be deprived or ousted of its jurisdiction by any such subsequent proceedings.

II. That the witness had no legal jurisdiction of the defendant at the time of said trial, he, the defendant, being already under bonds for the said offence, and consequently said trial was null and void.

Defendant's counsel then stated that his only object in examining the witness on this point was to contradict and impeach the witness, William H. Smith. The evidence was allowed for that purpose.

Answer.—I tried Benjamin on the 25th day of March, 1854, on the same day on which he was arrested for assault and battery, on complaint of William H. Smith, made on the 16th day of December, 1853. Smith was sworn on the trial. He swore that Benjamin and others commenced a fight with him at the canal bridge and ended at the house.

Question.—Did you convict and sentence Benjamin?

Objected to by the people's counsel on the following grounds:

I. That the former trial and conviction had not been specially pleaded.

II. That it is not the proper evidence in form. It should have been the record of conviction duly filed according to law.

The People v. Benjamin.

Objection sustained. Defendant's counsel excepted to the ruling of the court.

Defendant's counsel then offered in evidence a paper, which he said was a transcript of the docket of Esquire Winne of the trial of said Benjamin, and offered to prove the correctness of the same by witness.

Objected to on the same grounds by the people's counsel and the objection was sustained by the court and defendant excepted.

Defendant's counsel then offered to prove by the witness, that upon the trial before him, the defendant was convicted and sentenced to pay a fine of \$10 or in default thereof to be imprisoned in the penitentiary of the county sixty days and that said fine had been paid.

Objected to by people's counsel on the same grounds. Objection sustained and defendant excepted.

The cause was then submitted, whereupon from the evidence I found defendant guilty of said offence, and I did adjudge and order that the said defendant, Warren Benjamin, should pay a fine of \$50 or in default thereof to be imprisoned in the penitentiary of the county for the term of six months. All of which is returned as by the said writ commanded.

Given under my hand and seal this 9th day of May, 1854.

DANIEL C. STEWART,
Justice of the Peace.

The following is a copy of the warrant annexed to the return:

Albany County, Town of Watervliet, ss:

To any constable of said county—Greeting: Whereas, complaint has this day been made before Daniel C. Stewart one of the justices of the peace in and for said county, by William H. Smith that one Warren Benjamin on the 16th day of December, 1853, at the town of Watervliet in said county, with force and arms did grievously assault and beat him, the said William H. Smith, and we having examined the said complainant on

The People v. Benjamin.

oath touching the said offence and accusation, and it appearing to us from such examination, that such offence has been committed. You are therefore hereby commanded, in the name of the people of the state of New York, forthwith to apprehend the said Warren Benjamin and bring him before the said justice, to be dealt with according to law.

Witness the said Daniel C. Stewart at West Troy in said county, this 16th of February, 1854.

DANIEL C. STEWART, *Justice*.

Peter Johnson for the defendant.

I. The proceedings of a Justice's Court may be proved by the justice, who is a competent witness to verify his minutes, which must be produced and can not be proved by parol. Though not technically a court of record, the proceedings are in the nature of a record. (11 *John. R.* 166.) The proceedings in any cause had before a justice may be proved by the oath of the justice. (2 *R. S.* 456, 4th ed.; 15 *Wend. R.* 237.)

II. The judgments and proceedings of inferior courts, not of record, may be proved by the minute book in which the proceedings are entered. So an examined copy of the minutes will be sufficient. If the proceedings of an inferior court are not entered in the books, they may be proved by the officer of the court, or some person conversant with the facts. (*Roscoe Cr. Ev.*, 204; 2 *Ohio R.* 17; 1 *Starkie Ev.* 303, 3d ed.) A Justice's Court is not a court of record. (23 *Wend.* 374.)

III. The former trial and sentence might be proved under the plea of not guilty. A former recovery may be proved in trover under the general issue. (6 *Hill* 114, 2 *ib.* 478.)

IV. A magistrate's warrant continues in force until fully executed, during the term of office of the magistrate granting it. (1 *Ch. Cr. L.* 46 50; *Peake's N. P. Cases*, 234.)

H. Harris (District Attorney,) for the people cited, 2 *R. S.* 304; 3d ed. § 45; 1 *Green. Ev.* § 513..

By the Court, PARKER, J.—It is apparent in this case that

The People v. Benjamin.

the trial before Esquire Winne, was carried on more for the benefit of the defendant than of the public. The injured person was not complainant, but was a very reluctant witness, and his counsel objected to the whole proceeding. It was evidently an attempt to get off the defendant with a very light punishment for a very atrocious offence. But it failed of its object.

Under the plea of *not guilty*, the defendant had no right to prove a former trial and sentence, nor even that a proceeding was then pending before a different tribunal for the same offence. (*Arch. Cr. Pl.* 92, 94.) The rule is that under a plea of *not guilty*, the defendant may give in evidence everything which negatives the allegations in the indictment or complaint and all matters of excuse or justification. Where a defendant wishes to avail himself of a former trial and judgment, he must plead *auterfois acquit* or *auterfois convict*, as the case may be.

In this case the defendant pleaded not guilty, and the cause was tried upon that issue alone. If, after the joining of issue, any thing occurred which might be available as a defence, the defendant could only avail himself of it by a subsequent plea, and by presenting a new issue for trial. That was not done, and the evidence of the trial and sentence before Esquire Winne, was properly excluded upon the merits.

We think the objection to the species of evidence, by which the facts were offered to be proved, was also well taken. The record of conviction, if it had been filed, or a duly certified copy of it, would have been the proper evidence. (2 R. S. 717, § 38, 39, 40.) If it had been shown that no record of conviction had been filed, the secondary evidence might have been received. (2 R. S. 739, § 10: *Barb. Cr. L.* 407, 2d ed.)

The judgment must be affirmed.

ORLEANS OYER AND TERMINER. May, 1855. Before *W. F. Allen*, Justice of the Supreme Court, *Curtis*, County Judge, and the Justices of the Sessions.

THE PEOPLE *vs.* JAMES RANDOLPH.

A boy under fourteen years of age, indicted for rape, being presumed to be physically incompetent to commit the crime, can not be convicted of an assault and battery with intent to commit a rape, though he may be convicted of a simple assault and battery.

The prisoner was indicted for a rape and had been once tried and convicted. He was under the age of fourteen at the time of the alleged commission of the offence charged. Upon the former trial, the question was submitted to the jury, whether the prisoner was capable of committing the offence. Upon error brought upon that conviction, the Supreme Court sitting in the eighth district decided that the presumption of the incapacity of an individual under fourteen to commit the offence of rape was not conclusive, but might be overcome by evidence that the party charged had attained to puberty, but that there was no evidence of that fact upon the trial of this indictment which should have been submitted to the jury and reversed the conviction, granting a new trial to the prisoner. (a)

Upon the second trial, no additional evidence was offered tending to show the competency of the prisoner to commit the offence charged, and the court held, under the decision of the Supreme Court, that a conviction for the crime of rape could not be had.

B. L. Bessac, (District Attorney) urged that notwithstanding the age of the prisoner and his presumed inability to perpetrate the offence, he might lawfully be convicted of an assault *with intent* to commit a rape, and that it should be submitted to the jury with proper instructions to pass upon the guilt or innocence of the party, of this offence.

(a) See case reported page 174.

The People v. Randolph.

Church & Davis, for the defendant, insisted that the prisoner could only be convicted of a simple assault and battery upon the ground that the law adjudging that he could not commit the offence charged, he could not be guilty under the law of a criminal intent to commit the offence, and cited *Rex v. Eldersham*, 3 C. & P. 396; *Grovenbridge's case*, 7 *id.* 582 and *Regina v. Phillips*, 8 *id.* 736.

THE COURT ruled that the guilty intent, which, under the statute, aggravated a simple assault and battery and made it punishable as a felony, could not exist where there was a physical incapacity presumed by law of the person charged, to consummate the offence alleged to have been intended. The intent was simply a thought or desire, which could not in the nature of things produce any result, the highest offence of which the party was capable being a mere assault and battery, as determined by the law itself. The circumstances attending the assault are to be considered in awarding a punishment for the offence.

In *Eldersham's case*, Vaughan, B., held that a boy, under the age of fourteen, could not be convicted of an assault with intent to commit a rape. Gaselee, J., held the same, after consulting Lord Abinger, C. B., in *Rex v. Grovenbridge*, and Patterson, J., made the same ruling in *Phillips' case*. The reverse had been, before either of these cases, decided by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Green*, 2 Pick. 380, *Parker, C. J., dissenting*. The reasons assigned in the prevailing opinion are not sufficient, against the dissent of the Chief Justice, to overcome the force of the English cases and the principle upon which they are based. If the offence deserves a higher penalty than can be imposed for a simple assault and battery, the remedy is with the legislature, who can provide such a punishment as will most effectually protect females from boys of vicious propensities. That the presumption of impotency is in England absolute, while, as held by the Supreme Court in this case it is only *prima facie* in this

The People v. Lake.

state, does not affect the question. It is conclusive until overcome by evidence.

Under the direction of the court, the prisoner was found guilty of an *assault and battery*.

DUTCHESS OYER AND TERMINER, May, 1855. Before *Dean*
Justice of the Supreme Court and the County Justices.

THE PEOPLE vs. GEORGE LAKE

Rules and directions to govern a jury on trial of the question of present insanity, on an indictment for murder. (a)

The prisoner in this case had been tried and convicted of murder at the Dutchess Oyer and Terminer. The conviction was afterwards reversed by the Supreme Court, and a new trial awarded. (1 *Park. Cr. R.* 495.) When the public prosecutor moved on the cause for the second trial, the prisoner's counsel alleged present insanity, and a jury was impaneled to try the question. Fifteen witnesses (physicians) were examined.

M. & H. Hale, for the prisoner

T. C. Campbell, (District Attorney,) for the people.

The following charge was given to the jury by the presiding judge.

Gentlemen of the Jury—The statute declares that “no insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state.”

(a) No insane person can be tried, sentenced to any punishment, or punished for any crime or offence while he continues in that state. (2 *R. S.* 697, *Freeman v. The People*, 4 *Dento*, *R.* 9.)

The People v. Lake.

The prisoner stands indicted for the highest offence known to the law, murder, and that, too, committed upon his own wife and offspring. He has been once tried and convicted on this charge, and a new trial granted him, not because the court believed him insane, but wholly on the ground of error arising on the admission and rejection of improper testimony. The new trial was set down for this time, the public prosecutor moved it on, the prisoner's counsel alleged his insanity, and the court deemed it proper to try that question first and distinct from his crime. It is for this purpose, to determine whether he is now insane, that you are impaneled. You will not allow the atrocity of the offence, nor the supposed effect of your verdict, either on the prisoner or the community, to influence you in the least, but, unswayed by prejudice and unbiassed by feeling, you will pass upon the question of his present sanity; if you find that he is sane, we shall then proceed to try him on the indictment; if, on the contrary, you find him insane, the humanity of the law interposes for the protection of his life until he is restored to reason. In the mean time, he will be kept in close confinement, and society protected from his fury.

Before proceeding to call your attention to the law as applicable to this case, I will make a passing remark on the strange objection that has been made by one of the counsel in reference to the propriety of the request made by the court for physicians to examine the prisoner, so as to be able to testify as to his state of mind. The court did not do this; I did it, and assume its full responsibility. And I only allude to the subject on the prisoner's account, lest you might not, if you supposed there was any thing improper in the selection of these men, give to their testimony the weight it would otherwise have. The defence on the former trial had been insanity, respectable physicians had then testified that he was insane, others, that he was not. The alleged insanity continued and physicians it was said, would not make an examination. Knowing that the object of a trial was to elicit truth, and that truth could only be obtained by knowledge, and that knowledge was acquired by investigation, that you might have some evidence,

The People v. Lake.

some rational opinions, founded upon sufficient facts, I made the request for four medical men to make an examination satisfactory to themselves. The four physicians were of my own selection, one of them, Dr. John Cooper, Sen., had, on the former trial, given his opinion that he was sane, another, Dr. Varick, had on that trial testified that in his opinion he was insane, while the other two, Doctors Hughson and Bockee, had never seen him, and were consequently uncommitted. I need not tell you, gentlemen, what is the professional standing of these four men among their brethren in this county or in the community. If the object of this trial is, however, to go into the matter blindfold, rather than to elicit truth, then it is very improper to have any body examine him enough to form an opinion. It has been said that this looks like an attempt of the court to have the man found insane. Is it possible that the district attorney will make such an admission, that an investigation by competent physicians must lead to a verdict of insanity? You should not take it as such, and I hope you will not allow even his mistakes to prejudice the rights of the people on the one side, nor any thing that the court may do, to affect the prisoner. You are not trying the court or any of its officers, but the sanity of the prisoner. Whenever any issue is made against me, I shall be glad to meet it here or elsewhere. If the public, or any one who represents it, desires to see any one hung without an opportunity to know whether he is in a proper state of mind to be tried, or a fit subject of punishment, they must not ask me to assist at the execution.

To return to the question to be tried, is the prisoner now insane? To determine this, it will probably be unnecessary to give you a definition of insanity; it is a condition of mental existence which is known and recognized in the laws of all civilized states, and which exempts the person subject to it from punishment. Its symptoms or outward manifestations, are well known by those who have devoted their time and attention to its study.

Insanity is as various in its phases and effects as the persons

The People v. Lake.

in whom it appears, yet there are four general classes into which, for convenience it is divided.

1. *Mania*, where the hallucination or delusion is general, extending to all objects.

2. *Monomania*, in which the hallucination is confined to a single object, a class of objects, or to a limited number of objects.

3. *Dementia*, or madness, where the person afflicted is rendered incapable of reasoning, in consequence of functional disorder of the brain, not congenital, or born with the person.

4. *Idiotism*, total want of the reasoning powers from malconformation of the organ of thought at the time of birth.

It is not pretended that the prisoner is an idiot, and has never been of sound mind; nor do I think it can be claimed that he is absolutely demented, or rendered incapable of reasoning upon all subjects; his lunacy, if it exists at all, is in the form of a mania or monomania, probably the latter.

Your position in a case of this kind is peculiar. In ordinary trials, you are to hear the testimony of witnesses as to the existence of certain facts, and on them find a verdict. Here you are to form an *opinion, on the evidence of opinions*. This results from the nature of the subject of inquiry, the mind, an existence which is invisible, imponderable, intangible, and immeasurable. The minutest filament of matter, the air itself, can be weighed, but there are no scales in which the mind can be balanced.

If the title to land is in dispute the deeds and conveyances, the surveyor's compass and chain can determine the question. So of almost any action or prosecution, the facts as detailed by the witnesses will enable a jury to determine the question at issue. But here the point in dispute is the existence or non existence of a certain mental state. It is not even the *amount* but the *soundness* of mind.

Ordinary persons, no matter how intelligent, can not give an opinion, but any man who has acquired, as an addition to his name, the letters M D., be he ever so ignorant, can give you his opinion.

The People v. Lake.

Another question arises, are you to base your verdict upon the opinion of medical men or your own?

On this subject, the whole theory of jury trials, and the reason of the case, satisfy me that it is *your* opinion, and not that of the doctors, which is to make up the verdict.

How much reliance you should place on the opinion of a medical witness, depends upon his skill, his means of judging of the true mental condition of the prisoner, and the facts he details to you as the basis of that opinion.

Mathematics, chemistry, philosophy and surgery are sciences, but medicine, unfortunately, can not be ranked among them. Between Allopathy and Homœopathy, and the various other systems, every nostrum and every humbug has its practitioners and its victims, but there are nevertheless among those who pursue this profession scientific men, whose opinions on mental or physical diseases are entitled to consideration. There are certain things which are settled, the state of the pulse and skin in fever; the effects of certain articles, used medicinally, on the human system; so there are certain phenomena, which when they exist, are admitted to be symptoms of insanity. Among these are wakefulness, want of appetite, or the reverse, an excited pulse with cold extremities during the absence of any inflammation, heat of the head, melancholy, an expression of the eye, hard to describe, but which, while it shows intellectual dullness, exhibits a stare or wildness easily discernible by those acquainted with insanity, alternate laughter and weeping, without any perceptible or sufficient cause, a suspicion of friends. These symptoms, even with those known to be insane, are rarely if ever all present in the same person, but the existence of any number of them, accompanied by incoherent conversation and unusual conduct, ordinarily prove the patient insane.

Do these symptoms, or any of them, exist in the case of the prisoner? The sheriff has testified in reference to his wakefulness; that he had watched him, and never found him sleeping, and never but once when he seemed to have been sleeping. Houghtaling has given evidence in reference to his want of sleep the night following the murder. The only proof we have

The People v. Lake.

as to the pulse shows that it is accelerated or faster than in a person of his age in ordinary health. It is shown that he has been known to laugh and weep alternately, and without any apparent cause. That he is and has been, ever since the homicide, suspicious of his friends, and that he refuses to confide in or consult with his counsel. It is also in evidence that just before the homicide he was seen while in the public highway to stop his horse, take him by the head, lead him around in a circle, then drive a few rods, and repeat the same thing; that he was seen sitting on the top of the bureau in his house, with his feet in the drawer, laughing, crying, talking incoherently, and striking his head against the wall. These symptoms and actions are all consistent with insanity. I do not say that they are controlling, but should be carefully weighed and considered by you in deciding this question.

Every one who has heard the evidence, and observed the conduct of the prisoner during this trial, will agree that this is a case either of simulated or real insanity. Which is it? In determining this, you should take into view his circumstances in life; the opportunity he has had for learning the real symptoms of insanity. If he were a physician and had committed crime, it would be far easier for him, knowing the symptoms, to imitate them. The only evidence we have as to his situation is that he has lived in the interior of the country, that his circumstances are very humble, and that he can not write even his name. The probabilities are, therefore, that he has little if any learning of books, and consequently, if he feigned, does it without knowing the precise symptoms necessary to accomplish his object.

There was a fact stated by Dr. Upton, which in my mind weighed very strongly in favor of the reality of his madness. You will remember that we yesterday took a recess of the court to allow the physicians subpoenaed against the prisoner to examine him. This examination was conducted by Dr. Upton, who asked the prisoner why he traveled so much in the night, just before the homicide. To this he replied that he could get no rest at home, and in describing the methods resorted to, to

The People v. Lake.

obtain rest, said he was in the habit of going down stairs and leaning against the bags of oats to sleep, instead of sleeping in a bed. Beck, in his Medical Jurisprudence, quoting from Hasam, says: "The symptoms are aggravated by being placed in a recumbent position; and patients, when in the raving state, seem, of themselves, to avoid the horizontal position as much as possible, and when so confined that they can not be erect, will keep themselves seated. This remark applies equally to mania and monomania." If Lake, prior to the murder, could not sleep nights, could find no rest, went instinctively to a place where he could lean against the bags of oats, instead of lying down upon a bed to sleep—here is a very strong evidence of insanity. It is scarcely possible that he yesterday, when stating this fact to the physicians, knew its effect as evidence, for it seemed to attract no attention from them, and had not been alluded to by counsel; but to my mind it is a most controlling circumstance in the case, and irreconcilable with the theory of simulated insanity. Again, we find that yesterday, when the court adjourned, it was announced in the prisoner's presence that the object was to allow physicians to make a personal examination, and testify in reference to him. They did make that examination; then, if ever, he would have feigned insanity, or would have refused to answer. But, on the contrary, he answered every question, was accurate in dates, and exhibited no aberration of mind until he was asked in reference to the homicide, and as to that said if his "wife was black, then it was all right; if not then he was accountable," and as a reason for killing his children, that, "when the body went down to the ground it needed neither food nor raiment." This to me resembles delusion far more than simulation.

Again, wakefulness can not be feigned for any continued length of time. Dr. Beck says: "Pretenders are unable to prevent sleep. That wakefulness which is so constant an attendant on the insane, is scarcely to be preserved for any length of time by those who are in actual health." He then cites the case of a seaman, who to escape punishment, enacted the part of a furious maniac; sound sleep overpowered him on the second night of

The People v. Lake.

attempt. This must be so; for sleep is not a voluntary state. No man, by his mere volition, can put himself to sleep, nor can the strongest will, unaccompanied by mental and physical excitement, prevent it. Both body and mind require it, and it comes unbidden.

The counsel for the prisoner insists that the homicide itself proves the insanity of the perpetrator. To hold this sufficient evidence to establish insanity would be dangerous; but it is proper to examine the act with all its attendant circumstances, and see whether it is most consistent with real or pretended insanity; see if you could discover a motive, or a sufficient motive; whether these victims stood in his way, whether there was any jealousy of his wife. And in doing this, you are to regard the prisoner as a human being, possessed of moral, intellectual and physical faculties swayed by passions and actuated by affections. But you will not allow the atrocity of the act alone to satisfy you of the insanity of the perpetrator.

I regret that you have not had more aid from professional men of sufficient skill to determine the prisoner's actual condition. The same author from whom I have before quoted, says: "Madness is most commonly feigned for the purpose of escaping the punishment due to crime, and the responsibility of the medical examiner is consequently great. It is his duty, and should be his privilege, to spend several days in the examination of a lunatic, before he pronounces a decided opinion." This has been neglected in this case, though the prisoner has for nearly two years occupied a cell in your jail. But you are now, on all the evidence that has been produced, to find a verdict. In coming to a conclusion, you will remember that every man is presumed sane, and responsible for his acts, until the contrary is proved, and therefore that the affirmative of the issue is with the prisoner. If the evidence satisfies you that he is insane, so that he can not make a rational defence to the indictment, you will say so, and he will then be placed where he will be treated for his disease, and if restored to sanity, will be tried for the offence. If, on the contrary, the evidence fails

The People v. Hammill.

to satisfy that he is insane, you will pronounce him sane, and we will then proceed to his trial for the crime.

You will not fail to remember during your deliberations that it is *you* who are to settle this question, and not the court; that if any intimation of an opinion has inadvertently escaped, that you will only regard it in as far as it was supported by satisfactory reasons. The prisoner, if insane, is most unfortunate in having been so long confined, and treated merely as a criminal; if he is not insane, he is still more unfortunate in being the perpetrator of a murder which in its atrocity is scarcely paralleled in the dark annals of crime.

The jury found the prisoner insane.

NEW YORK OYER AND TERMINER. April, 1855. *Edward P. Cowles*, Justice of the Supreme Court, presiding.

THE PEOPLE vs. TERRENCE HAMMILL.

On the trial of the prisoner for the murder of his wife, it having been proved that he killed her by stamping upon her, the court charged the jury that the crime was murder, if the prisoner intended to take the life of his wife; but that if he intended only to wound and bruise her, it was manslaughter in the second degree.

The court further charged, that, if the prisoner designed to take the life of the deceased, it made no difference as to the offence, whether he was drunk or sober at the time.

That though intoxication does not excuse crime, yet that the jury might take into consideration the fact of intoxication, so far as it would aid them in determining with what intent the act was done.

It is a rule of the common law, that a person is held to intend that which in the ordinary course of things would be the natural result of his own acts.

Illustrations of this rule given by the presiding judge, in his charge to the jury, with explanations as to its applicability in a case of intoxication.

In cases not free from doubt, the jury are at liberty to consider the prisoner's previous good character; but such a defence is not available where the guilt of the accused is clearly established.

The prisoner was brought to trial under an indictment charging the murder of his wife on the first day of January, 1855. He

The People v. Hammill.

was a laboring man of an unusually powerful frame and of great physical strength.

On the evening of January 1st, 1855, he was discovered in his house in the act of stamping upon his wife, who, on being raised from the floor, was found to be dying, and survived for a few moments only. No one before this discovery had witnessed the scene. His wife's person exhibited marks of the most brutal violence, the head and chest being covered with bruises and blood. She had evidently been stamped to death by the prisoner, who wore heavy iron-nailed shoes. No cause was shown for the prisoner's acts, further than that both the prisoner and his wife had returned some two hours before from a visit to one of their neighbors, in a state of partial intoxication. A bottle of liquor, known to have been partially filled on their return, was found in the house empty.

For the defence the prisoner was proved to have been a man of previous excellent character, unusually industrious and frugal. Except when under the influence of liquor, he was shown to have been habitually and uniformly kind, attentive and affectionate to all of his family; that his habits were, with few exceptions, strictly temperate. Occasionally (and generally only on anniversaries or holidays) he would give way to intoxication. When under the influence of spirituous liquors, he generally became infuriated and ungovernable, attacking any one who came in his way, not distinguishing, and apparently incapable of distinguishing, between friends and strangers. That, except on such occasions, he was mild, peaceable, quiet and inoffensive in his manners.

The prosecution claimed a verdict for murder. The defence urged that it should be only for manslaughter in the second degree.

A. Oakey Hall, (District Attorney) for the people.

H. L. Clinton, for the prisoner

The court charged the jury as follows:

The People v. Hammill.

Gentlemen.—The case now to be committed to your hands is an unusually painful one. The prisoner is not a man who has been familiar with vice or hardened by crime. Though in the humble walks of life he is proved by men of the highest standing who have known him well, to have sustained the most irreproachable character for honesty, integrity and industry, and on all occasions, except when infuriated by intoxication, for kindness, and attention, and affection to all his family. With that single exception, no better character in all these respects, or for quietness and unobtrusiveness of manners, could have been shown than has been established for him.

But he stands before you now charged with the murder of his wife. So clear is the proof that she died by violence and that violence inflicted by the prisoner, that his counsel does not insist to the contrary, but urges that the crime is less in degree than that of murder.

This is a question for you. Your duties are first to determine whether the deceased came to her death by violence. If so, then next whether it was inflicted by the prisoner. If you find in the affirmative on both of these questions, your next inquiry will be whether these acts of violence were, in the language of the statute, “perpetrated from a premeditated design to effect the death of the person killed.” If so, then the prisoner is guilty of the crime of murder.

The important question for you to determine, if you find that the prisoner caused this death, will be the *intent* with which he did this violence. What did he intend? What did he design should be the result of his acts? Did he mean to kill? Was that idea in his mind as he gave the blows! If so, the crime is complete and your verdict must pronounce it murder.

And it matters not what was his state as respects sobriety or intoxication at the time, provided you find he gave the blows with the design to kill; for, if he meant that, then, whether at the time he was drunk or sober, in either case, his crime is murder.

Whether he was intoxicated or otherwise, the question will still be, What was his intent? Was it to kill or only to wound?

The People v. Hammill.

and bruise? On the solution of that question rests your verdict, for intoxication is no excuse for crime. For an act designedly perpetrated although done when drunk, the law holds the perpetrator to the same responsibility as if done when sober.

But while intoxication does not excuse crime, in other words does not excuse a party from the consequences of acts which he purposely perpetrates, although drunk at the time, nevertheless the jury may always take into consideration the fact of the intoxication of the accused just so far as it will aid them in determining with what intent the act was done. We do not always attribute the same motives or intentions to the acts of a drunken, that we do to those of a sober man. We act upon this rule in every day life, and we act upon it because our experience teaches its correctness.

A familiar example from such scenes as you have probably all of you witnessed will illustrate my meaning.

A person in a state of intoxication approaches us in a rude and boisterous or in an unduly familiar manner. Do we not often feel and indeed know that in all this there is an entire absence of the remotest idea of insulting or offending, that such conduct results from an impaired judgment or power of discrimination or sense of propriety caused by the state of inebriety in which we see him. Yet the same acts perpetrated by the same person in a state of sobriety would lead us to no other inference than that insult and outrage were intended. Intoxication partially impairs the judgment, as is exemplified when we see a man in his cups sometimes give blows which in their effects are far more severe than he intends or is conscious of. It arises from his inability to measure the strength he is putting forth with the same accuracy he does when sober. All these things in every day life we consider when determining how far a party has intended the full effect produced by his acts.

In so far then as the fact of this man's intoxication may aid you in solving the question whether, when he gave his wife these blows, he only intended to hurt, to bruise, or meant that

The People v. Hammill.

they should kill, you are at liberty to consider it, but not otherwise. In looking in upon his mind, in analyzing its secret workings, motives and intent, during that fatal hour, this fact may throw some light upon what he meant should be the consequences of his brutality and violence. So far and with that view, you may consider it; but no further.

It is an old and salutary general rule of the common law that a man is held to intend that which in the ordinary course of things would be the natural results of his acts.

This rule is based upon sound reason and universal experience. Thus, if one raises his rifle and deliberately fires its contents into the bosom of another, or by a blow with an axe which might fell an ox buries it in the brain of another, the inference from the act is irresistible that death was meant, and so the law presumes.

The inferences of the mind which are equally presumptions of law are certain and conclusive in proportion as the acts from their nature and character are certain to result in death.

Thus the plunging of a poniard into the heart of another we do not doubt was meant to kill, but if aimed only at the arm or leg, though death may be the result, yet the mere fact of giving such a blow so long as that is the only criterion by which we judge, renders the intent more doubtful and the inference less strong.

So if one beat a full grown man with his fist and death ensues we would ordinarily feel far more doubt that death was intended, than if it had been produced by the use of a dangerous weapon.

So too regard may be had to the relative strength and powers of endurance of the parties as well as to the mode in which the violence is applied.

A powerful blow given by the fist alone (but not repeated) upon the head of a full grown man would not ordinarily be regarded as intended to produce death; but what else could be inferred than an intent to kill, if the same blow were planted upon the temple of an infant child.

In many cases the inference that death is intended is as

The People v. Hammill.

strong when the act is perpetrated by a drunken as when perpetrated by a sober man.

Thus, if by a deadly weapon, as by a rifle or bowie knife, a bullet or blow is sent directly or designedly to some vital spot, we should infer that death was intended with almost equal certainty whether the perpetrator were drunk or sober.

So too when death is produced by poison, and we see in the mode of its administration stealthy calculation, we would infer that death was intended, whether he who administered the poison was in a state of sobriety or intoxication, since, in the very character of the act, we could read design.

But we also know that intoxication produces more effect upon the nervous system of some than of others. It clouds and obscures the judgment of one more than it does another. It produces greater extravagance of exertion and action in some than it does in others, and sometimes consequences result, from such extravagant exertion and action, of which the party himself had no idea. All these things are to be considered by this jury when determining upon this question of intent.

Had this prisoner, in a state of entire sobriety, thus deliberately kicked and stamped upon his wife, and for that length of time which the mutilations of her person showed must have been the case, this jury might not have hesitated in believing that such brutality so long continued was the prompting of a murderous mind.

If however you find that he was in a state of intoxication which was affecting his whole nervous organization; that in consequence his judgment was impaired and to such an extent that he was in a measure incapable of knowing the degree of violence he was perpetrating or of properly and accurately calculating its effects to their full extent, all this the jury may take into consideration so far as it enables them to judge whether, at the time of the violence, he meant only to beat or to kill.

If he perfectly understood what he was doing and either designed her death, or if he well knew that such was likely to be the consequence of his acts and yet kept on neither consid-

The People v. Hammill.

ering nor caring what the result of his violence might be, his crime is that of murder.

But if his judgment was in part obscured and his only intention was to severely beat his wife but with no thoughts that death was either certain or possible, then the jury may convict of a less offence. His crime would then be of that species which the statute defines as the "killing of a human being without a design to effect death, in a heat of passion, but in a cruel and unusual manner."

The prisoner has proved an excellent previous character. In many cases this is of great importance, in others none whatever.

Where the intent to kill is clearly proved, if that is the only question, then character avails nothing in defence. Wanton killing is as much murder in the virtuous as in the vicious. But when the intent is not certain, when the minds of the jury feel that the scales are nearly poised, then the jury may do that which the prisoner humbly asks them to do here, throw the weight of his good character into the scales and thus secure a preponderance in his favor. In cases not free from doubt, the law allows it. The prisoner may, if you are not entirely satisfied by the testimony, point to his past life and urging the fact with all the force to which it is entitled say I have been a man of peace and quiet, not of turbulence and blood; I have been uniformly honest, faithful and industrious, kind and affectionate in my family, attentive to all their wants and reputable and respectable in society. He asks you to remember all this and then to say whether he has from "premeditated design" killed the wife of his youth and the mother of his children. If he has, it is murder and on your oaths you must so pronounce it. If you find otherwise but are still satisfied that she has died by his violence, you may find a verdict of manslaughter in the second degree.

The jury found a verdict of manslaughter in the second degree.

SUFFOLK OYER AND TERMINER, March, 1853. Before *S. B. Strong*, Justice of the Supreme Court, *W. P. Buffett*, County Judge, and the Justices of the Sessions.

THE PEOPLE *vs.* JOHN F. DEWICK.

On the trial of an indictment at the Oyer and Terminer, for murder, after eleven jurors had been drawn and sworn, the next juror drawn was challenged for favor, and the two jurors first admitted, having been sworn as triers and having heard the evidence, the argument of counsel and the charge of the court, after consultation reported to the court that they could not agree in deciding upon the challenge; it was held, that the challenge must be retried and the court selected the third and fourth jurors to act as triers for that purpose.

Suggestions as to the practice on challenges for principal cause and for favor, and as to the proper mode of selecting triers and deciding upon their competency.

The prisoner was tried on an indictment for the murder of his father. After eleven jurors had been sworn and taken their seats, John C. Leak, was called as a juror, and being informally examined by consent, stated that he had conscientious scruples against finding the accused guilty of murder from what he had heard, although he had not heard enough to prevent his concurrence in a conviction if the evidence should call for it. He was therefore challenged *for favor* by the district attorney, on the ground stated in his examination. The challenge was contested by the counsel for the prisoner. The two jurors first admitted were sworn as triers. The proposed juror was then sworn as a witness, and reiterated what he had previously stated. The triers after hearing the remarks of the counsel, and the charge of the court, and after consulting together, reported *that they could not agree*. The counsel thereupon submitted the question to the court as to the proper course to be pursued, without any motion, suggestion or argument.

W. Wickham, Jr., (District Attorney) for the people.

A. T. Rose & A. W. Floyd, for the prisoner.

The People v. Dewick.

The following opinion was delivered by the presiding justice, in the conclusion of which his associates concurred.

S. B. STRONG, J.—We are called upon to adopt a rule of procedure without any statutory regulation, and in the absence of any discussion, and so far as I know, of any precedent. In directing the course to be pursued, we must be controlled by a consideration of the design to be accomplished and the principles governing ordinary trials upon the merits, so far as they may be applicable. We have no other guide. Challenges of persons called as jurors in criminal cases have latterly become very common, so frequent indeed that the trials seem to be as much of the jurors as of the accused. The rule applicable to them should be well considered and deliberately settled, in order to prevent the necessity for new trials by reason of trivial mistakes, upon matter having but slight reference to the main issues involved in their decision.

Challenges to proposed jurors, are either for principal cause or for favor; for principal cause, when the fact alleged would, if proved or admitted, be sufficient to require the rejection of the juror, without any proof of its actual influence upon his mind. In such case, the law presumes the effect from the sufficiency of the cause. Challenges for favor are for matters which may, or may not, prejudice the mind of the juror, and in such cases the effect upon his mind is a question of fact.

In challenges for principal cause there may be a demurrer, admitting the fact, and denying its sufficiency. Then a simple question of law is presented, which is proper for the decision of the court. There may be an issue however, as to the fact alleged, and as that in effect admits its sufficiency if established, the question would then seem to be a proper one for the determination of a jury, or, in these cases, the triers who act as *quasi* jurors. That would harmonize with the well established rules in trials at law, that to questions of law the court, and to questions of fact the jurors, respond. I am aware that in modern practice the courts have decided the challenges for principal cause as well where questions of fact simply, as

The People v. Dewick.

where questions of law, have been involved; but I can find no authority in the old elementary writers, nor in the early reports, for thus submitting the determination of questions of fact to the court; and as it is wrong in principle it seems to me that the safer and more appropriate course is, when such questions are raised on challenges for principal cause, to submit them to the decision of triers.

When challenges for favor are interposed, there can be no demurrer by a party intending to controvert them, as that would admit not only the primary fact alleged, but the charged bias upon the mind of the juror, and thus necessarily effect his rejection. When any issue is joined in such cases, it is simply one of fact, and must, therefore, be submitted to triers. Their decision either way is conclusive as to the fitness or disqualification of the proposed juror. They may disagree however, although, as there are but two, or at the most three, and as the question submitted to them is not one productive of much excitement, such a result is not very probable. When they disagree the challenge still remains. It is not, as some have supposed, in effect decided against the challenger, as he holds, and has failed to establish effectually the affirmative. In all issues of fact one of the parties necessarily holds the affirmative, but when there is evidence sufficient to go to the jury, and the matter has been submitted to them, and they have failed to agree, the question is still an open one, and the action can not be finally decided without another, and an effectual trial. We have no other rules, nor is there any reason why we should have, to govern us on the trials of challenges. It is true that in the case of a disagreement the party interposing the challenge has not fully sustained it, neither has he altogether failed, for where the more usual number of triers has been sworn he has convinced half of them to whom the determination has been submitted that he is right. Under such circumstances, it would be improper to accept or reject the juror. If the imputed bias exists, the proposed juror ought not to be sworn, if it does not, the party offering the challenge has a right to demand his services. There must therefore necessarily

The People v. Dewick.

be another trial, and the only remaining question is, in what manner the triers are to be selected.

The usual practice in cases where triers are appointed is, where no juror has been sworn, two triers are named without restriction by the court; when but one of the jurors has been sworn, he acts as trier with any two other individuals selected by the court, and when two of the jurors have been sworn, they are chosen, and if more, the first two. Whether a challenge can be interposed to a trier thus designated, does not seem to have been decided. Probably not, as challenges might then be interminable. No doubt, however, objections may be urged by either party to any one called as a trier, and in such cases the matter should be summarily investigated and decided by the court. It is very proper that the order of selection which I have indicated, should be generally adopted. Parties, and especially those who believe in the rectitude of their own conduct, are solicitous to obtain competent and impartial jurors. Latterly they have become so fastidious upon this subject, and so minute in their investigations, that our trials have been vexatiously and unnecessarily prolonged. A fixed rule of procedure and its observance will best prevent misapprehension and consequent complaint, and the more effectually subserve the ends of justice. But the rule of selection is not so rigid that it may not be relaxed when it becomes necessary. There must be a trial of any challenge properly interposed. When the usual line of procedure can not be strictly pursued we must apply the doctrine of approximation, which the expansive principle of the common law will permit, especially in cases where the main design can be substantially effectuated. The object in these cases is to procure the selection of competent triers. There may be good reasons for giving a preference to those who may have been admitted or found to be competent and unbiased jurors in the cause to be tried, over those whose qualifications have not been settled; but there can be none, other than having and abiding by some rule for preferring the first two to their associates who may have been sworn; nor can

The People v. Dewick.

there be any why the court should not make as unexceptionable a selection from the bystanders after some of the jurors had been sworn and proved to be impracticable triers, as they could when the first ballot was drawn from the box. In the present instance, the two jurors selected as triers can no longer act in that capacity. It would be a mere farce and result in nothing, to submit the matter to them again. We must therefore, of necessity, proceed, if we proceed at all, in the same manner as if they had not been sworn. The third and fourth jurors must act as triers.

Those jurors were accordingly sworn as triers. The same evidence was repeated before them. They were addressed by the counsel and charged by the court. After deliberation they reported that the challenge was true, and the juror was thereupon rejected.

The trial proceeded, the prisoner was acquitted on the ground of insanity, and after a subsequent investigation he was sent to the lunatic asylum.

SUPREME COURT. Albany General Term, June, 1855. *Parker, Wright and Harris*, Justices.

THE PEOPLE vs. HENRIETTA ROBINSON.

Voluntary drunkenness is not a legal excuse for the commission of crime.

The rule is otherwise where the drunkenness is not voluntary.

In the cases of *delirium tremens* or *mania a potu*, the insanity excuses the act, the frenzy being, not the immediate, but a remote consequence of indulgence in strong drink.

But where the nature and essence of the crime are made by law to depend upon the peculiar state and condition of the criminal's mind, at the time, and with reference to the act done, drunkenness may be a proper subject for the consideration of the jury, not to excuse or mitigate the offence, but to show that it was not committed. Per PARKER, J.

A person stimulated even to the highest pitch of frenzy by voluntary indulgence in strong drink, may still be capable of planning and executing a criminal design; and where in such case there is mind enough to conceive and perpetrate the act, there is enough to subject the offender to legal responsibility.

A case can not be brought within the first subdivision of the statute defining murder, (2 R. S. 657, § 5,) unless there be a premeditated design, *in fact*, to effect the death of the person killed, or of some other human being. Per PARKER, J.

Where, on trial of an indictment for murder by poisoning, the judge charged the jury "that if the prisoner was intoxicated to such an extent that she was unconscious of what she was doing, still the law holds her responsible for the act," but it appeared from other parts of the charge, that the judge intended to speak and that the jury must have understood him as speaking only with reference to a state of mental excitement or madness, the immediate consequence of indulgence in strong drink, and not of a state of insensibility, *held*, that the charge was not erroneous.

Held, also, that even though the expression excepted to could not be regarded as modified and explained by other parts of the charge, and might be considered erroneous as an abstract and separate proposition, yet that it furnished no ground for granting a new trial, it appearing plainly that it had no applicability to the case, there being no fact or circumstance to warrant an inference, that the accused was at the time of the commission of the act, in a state of unconsciousness or insensibility from intoxication.

After verdict, it is too late to object for the first time that no precept was issued by the district attorney to the sheriff requiring him, among other things, to summon a grand jury, under 2 R. S. 206, § 37, it appearing that the grand jury was regularly drawn and summoned according to the requirements of the statute.

Form of an indictment for murder by poisoning, with counts at common law and under the statute.

The People v. Robinson.

Where a person, charged to have been murdered by poison, expressed during his last illness, his opinion that he should not live, but was encouraged by his attending physician to believe that he would recover, his statements made immediately thereafter were held not to be admissible evidence as dying declarations. Per HARRIS, J.

Very soon after the drinking of the supposed poison, the deceased was asked how he felt "after that glass of beer," held, that his answer "that he did not feel comfortable," was competent evidence, though made in the absence of the prisoner. Per HARRIS, J.

Where, it appeared that a third person had drank with the deceased at the same time he was supposed to have been poisoned, of the same beverage and administered by the same person, and had died soon afterwards, the court permitted evidence to be given that arsenic was found in the stomach of such person, and that she died from the effects of that poison. Per HARRIS, J.

Symptoms of poisoning by arsenic described by physicians, with their opinions on the subject of insanity, set forth in the evidence.

This was a *certiorari* to the Rensselaer Oyer and Terminer, in which court the prisoner had been convicted before Harris Justice and the Justices of the Sessions, in May, 1854, of the murder of Timothy Lanagan, by poisoning. The indictment was as follows:

At a court of Oyer and Terminer held at the Court House in the city of Troy, in and for the county of Rensselaer, on the third Monday of February, in the year of our Lord one thousand eight hundred and fifty-four, before the Honorable Malbone Watson, one of the justices of the Supreme Court of the state of New York, together with Nathan T. Burdick and Thomas Newbury, Esquires, the two justices of the peace of said county designated, according to the statute in such case made and provided, as members of the Court of Sessions, duly authorized and empowered by virtue of their respective offices, and by the act in such case made and provided, at the time and place aforesaid, to inquire by the oath of good and lawful men of the said city and county, and by other ways and means, by whom and by which the truth of the matter might be better known, of whatsoever treasons, felonies, trespasses or other crimes and misdemeanors, or the accessaries to them in the said city and county, by whom, and in what manner soever done or com-

The People v. Robinson.

mitted, and of every circumstance concerning the same, and the said treason, felonies, trespasses and other crimes and misdemeanors to hear and determine.

County of Rensselaer, ss:

The jurors for the people of the state of New York, in and for the body of the county of Rensselaer, to wit: Martinus Lansing, Daniel A. Rhodes, James H. Eldridge, William P. Button, Edward A. Billings, Ezra Mambert, John F. Barringer, Hezekiah Coon, Thomas Stickney, William F. Hunt, Sandford A. Tracy, John B. Ford, John L. Wager, John Whitford, John M. Fonda, John Aiken, William C. Raymer, John L. Defreest and Israel Howe, then and there being duly sworn and charged, upon their oath present, that Henrietta Robinson, late of the city of Troy, and in the county of Rensselaer aforesaid, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and of her malice aforethought, wickedly contriving and intending one Timothy Lanagan with poison willfully, feloniously and of her malice aforethought to kill and murder heretofore, to wit: on the twenty-fifth day of May, one thousand eight hundred and fifty-three, with force and arms, at the city of Troy, in the county of Rensselaer aforesaid, knowingly, willfully, feloniously and of her malice aforethought, a large quantity of a certain deadly poison, called white arsenic, to wit: the quantity of two drachms of the said white arsenic, did put, mix and mingle into and with a certain quantity of beer, then and there being, to wit: one half pint of beer, and that the said Henrietta Robinson, then and there knowingly, willfully, feloniously and of her malice aforethought, did solicit, ask, persuade and instigate the said Timothy Lanagan, to drink and swallow down the said beer so mixed and mingled with the said deadly poison as aforesaid, and that he the said Timothy Danagan, by the said solicitation, asking, persuasion and instigation of the said Henrietta Robinson, as aforesaid, the said beer so mixed and mingled with the said deadly poison as aforesaid (he the said Timothy Lanagan not knowing the said beer to be so poison-

The People v. Robinson.

ed), did then and there, take, drink and swallow down, by means whereof he the said Timothy Lanagan then and there became sick and greatly distempered in his body; and the said Timothy Lanagan, of the poison aforesaid so by him taken, drank and swallowed down as aforesaid, and of the sickness occasioned thereby, on the said twenty-fifth day of May, in the year last aforesaid at the city of Troy aforesaid, in the county aforesaid, did languish, and languishing did live; on which said twenty-fifth day of May in the year aforesaid, the said Timothy Lanagan, at the city of Troy aforesaid, in the county aforesaid of the said poison and of the sickness occasioned thereby, died. And so the jurors aforesaid upon their oath aforesaid, do say, that the said Henrietta Robinson, the said Timothy Lanagan, in the manner and by the means aforesaid, knowingly, willfully, feloniously and of her malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henrietta Robinson, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and of her malice aforethought, wickedly contriving and intending the said Timothy Lanagan with poison, knowingly, willfully, feloniously and of her malice aforethought to kill and murder, on the twenty-fifth day of May, one thousand eight hundred and fifty-three, with force and arms, at the city of Troy in the county of Rensselaer aforesaid, knowingly, feloniously, willfully and of her malice aforethought, a large quantity of a certain deadly poison called arsenic, to wit: two drachms of the said arsenic, did put, mix and mingle it to and with a certain quantity of beer which the said Timothy Lanagan was then and there about to drink, (the said Henrietta Robinson then and there well knowing that he the said Timothy Lanagan, intended and was then and there about to drink the said beer, and the said Henrietta Robinson, then and there also well knowing the said arsenic so as aforesaid by her put, mixed and mingled into and with the said beer, to be

The People v. Robinson.

a deadly poison,) and that the said Timothy Lanagan afterwards, to wit, on the day and year last aforesaid, at the city of Troy aforesaid, and in the county of Rensselaer aforesaid, did take, drink and swallow down a large quantity, to wit, half a pint of the said beer with which the said arsenic was so mixed and mingled by the said Henrietta Robinson as aforesaid, (he the said Timothy Lanagan, at the time he so took, drank and swallowed the said beer, not knowing there was any arsenic or any other poisonous or hurtful ingredient mixed or mingled with the said beer,) by means whereof he, the said Timothy Lanagan, then and there became mortally sick and distempered in his body; and the said Timothy Lanagan, of the poison aforesaid so by him taken, drank and swallowed down as aforesaid, and of the said mortal sickness occasioned thereby, on the said twenty-fifth day of May, in the year aforesaid, at the city aforesaid, in the county aforesaid, did languish, and languishing did live; on which said twenty-fifth day of May, in the year aforesaid, at the city aforesaid, in the county aforesaid, the said Timothy Lanagan, of the poison aforesaid, so by him taken, drank and swallowed down, and of the mortal sickness occasioned thereby as aforesaid, did die. And so the jurors aforesaid upon their oaths aforesaid, do say that the said Henrietta Robinson, him the said Timothy Lanagan, in the manner and by the means aforesaid, knowingly, willfully, feloniously and of her malice aforethought, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henrietta Robinson, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and of her malice aforethought, wickedly contriving and intending one Timothy Lanagan with poison, willfully, feloniously and of her malice aforethought, to kill and murder, heretofore to wit: on the twenty-fifth day of May, one thousand eight hundred and fifty-three, with force

The People v. Robinson.

and arms, at the city of Troy, in the county of Rensselaer aforesaid, knowingly, willfully, feloniously and of her malice aforethought, and with a premeditated design to effect the death of the said Timothy Lanagan, in the peace of God and of the people of the state of New York then and there being, a large quantity of a certain deadly poison called white arsenic, to wit: the quantity of two drachms of the said white arsenic, did put, mix and mingle into and with a certain quantity of beer then and there being, to wit, one half pint of beer, and that the said Henrietta Robinson then and there knowingly, willfully, feloniously and of her malice aforethought, and with a premeditated design to effect the death of the said Timothy Lanagan, did solicit, ask, persuade and instigate the said Timothy Lanagan, to drink and swallow down the said beer, so mixed and mingled with the said deadly poison as aforesaid, and that he, the said Timothy Lanagan, by the said solicitation, asking, persuasion and instigation of the said Henrietta Robinson as aforesaid, the said beer so mixed and mingled with the said deadly poison as aforesaid (he the said Timothy Lanagan, not knowing the same to be deadly poison,) did then and there take, drink and swallow down, by means whereof he the said Timothy Lanagan, then and there became sick and greatly dis-tempered in his body; and the said Timothy Lanagan, of the poison aforesaid, so by him taken, drank and swallowed down as aforesaid, and of the sickness occasioned thereby, on the said twenty-fifth day of May, in the year last aforesaid, at the city of Troy aforesaid, in the county aforesaid, did languish, and languishing did live; on which said twenty-fifth day of May, in the year aforesaid, the said Timothy Lanagan, at the city of Troy aforesaid, in the county aforesaid, of the said poison and of the sickness occasioned thereby, died.

And so the jurors aforesaid upon their oath aforesaid, do say that the said Henrietta Robinson, the said Timothy Lanagan, in the manner and by the means aforesaid, knowingly, willfully, feloniously and of her malice aforethought, and with a premeditated design to effect the death of the said Timothy Lana-

The People v. Robinson.

gan, did kill and murder, against the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henrietta Robinson, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil and of her malice aforethought, wickedly contriving and intending the said Timothy Lanagan with poison, knowingly, willfully, feloniously and of her malice aforethought to kill and murder, and with a premeditated design to effect the death of the said Timothy Lanagan, on the twenty-fifth day of May, one thousand eight hundred and fifty-three, with force and arms, at the city of Troy in the county of Rensselaer, aforesaid, knowingly, willfully, feloniously and of her malice aforethought and with a premeditated design to effect the death of the said Timothy Lanagan, a large quantity of a certain deadly poison called arsenic, to wit: two drachms of the said arsenic, did put, mix and mingle into and with a certain quantity of beer which the said Timothy Lanagan was then and there about to drink, (the said Henrietta Robinson then and there well knowing that he the said Timothy Lanagan intended, and was then and there about to drink the said beer, and the said Henrietta Robinson then and there also well knowing the said arsenic so as aforesaid by her put, mixed and mingled into and with the said beer, to be a deadly poison;) and that the said Timothy Lanagan afterwards, to wit, on the day and year last aforesaid, at the city of Troy aforesaid, and in the county of Rensselaer aforesaid, did take, drink and swallow down a large quantity, to wit, half a pint of the said beer, with which the said arsenic was so mixed and mingled by the said Henrietta Robinson as aforesaid, (he the said Timothy Lanagan, at the time he so took, drank and swallowed down the said beer, not knowing there was any arsenic, or any other poisonous or hurtful ingredient mixed or mingled with the said beer,) by means whereof he the said Timothy Lanagan then and there became mortally sick and distempered

The People v. Robinson.

in his body; and the said Timothy Lanagan of the poison aforesaid, so by him taken, drank and swallowed down as aforesaid, and of the said mortal sickness occasioned thereby, on the said twenty-fifth day of May in the year aforesaid, at the city aforesaid, in the county aforesaid, did languish, and languishing did live; on which said twenty-fifth day of May, in the year aforesaid, at the city aforesaid, in the county aforesaid, the said Timothy Lanagan, of the poison aforesaid so by him taken, drank and swallowed down, and of the mortal sickness occasioned thereby as aforesaid, did die.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Henrietta Robinson, him the said Timothy Lanagan in the manner and by the means aforesaid, knowingly, willfully, feloniously and of her malice aforethought, and with a premeditated design to effect the death of the said Timothy Lanagan, did kill and murder, against the form of the statute in such case made and provided and against the peace of the people of the state of New York and their dignity.

There were other counts in the indictment. The prisoner pleaded not guilty. On the trial *Anson Bingham*, (District Attorney,) and *G. Van Santvoord* and *Henry Hogeboom*, appeared as counsel for the people, and *William A. Beach*, *Abm. B. Olin*, *Martin I. Townsend* and *Job Pierson*, for the prisoner.

On the trial *Doct. Henry Adams* was called as a witness for the prosecution and testified as follows: I reside in Troy, and am a practicing physician; have been for several years; knew Timothy Lanagan in his lifetime, and was his family physician previous to his death; he died in May, 1853; I saw him on the day of his death; was called to see him on the afternoon of that day; went to his house; remained there until he died; he died about half-past six or seven o'clock the same day; Dr. Skilton was there with me; he came there after I did, and continued there until the man died; Mr. Lanagan lived in the north or upper part of the city, corner of River and Rensselaer streets, south-east corner; that was the place where he died; the dwelling where he lived was a small one story building, not painted at that time, I think; there were two rooms; the

The People v. Robinson.

front room was used as a grocery store; this grocery fronted on River street; the other room was in the rear of the grocery, and was used for family purposes; he died in the back room; there was a bed in that room; I know the prisoner Mrs. Robinson, if it is she.

Mr. Hogeboom.—Is it not proper, your Honor, that the prisoner should remove her veil a little while, that she may be identified?

The Court.—There is no objection to that, is there?

The prisoner removed her veil, and witness said: That is the lady; I knew her some two months previous to Lanagan's death; she lived on the opposite side of the street, a little north; the house south of hers, and adjoining, is Mr. Boutwell's [a diagram was here shown witness of the location of the dwellings and streets in the neighborhood of which he was speaking; he said it was correct, and he pointed out the houses occupied by Lanagan, Mrs. Robinson, and Mr. Boutwell.] When I first arrived at the house, I found Mr. Lanagan in bed in the back room; when I first saw him he was vomiting profusely; I supposed from the symptoms that he had been taking some poison; this supposition was first induced by the statement of the family that poison had been administered to him; the symptoms indicating poison were intense pain in the stomach and bowels; burning sensation in the throat; vomiting was an indication of it; there were several evacuations of the bowels; these symptoms continued until his death; I do not know what he died of; suppose he died of the effects of some poisonous substance administered; this is my impression; this is my belief; it is a decided belief; I could not exactly tell from the nature of the symptoms what the poisonous substance was; the symptoms would correspond with the effects of arsenic; besides myself and Dr. Skilton in the room with Lanagan, were the family and friends of the deceased; no other physicians were present; I was not present at any *post mortem* examination; after arriving at the residence of Mr. Lanagan's, I found his symptoms were very violent, and I was apprehensive that the case would terminate fatally; Mr. Lanagan told me that he

The People v. Robinson.

thought he should not recover; he did not ask me what I thought; after seeing him I had no expectation of his recovery; I do not remember that he stated more than once that he thought he would not recover; his expression was this: "the villain has destroyed me, and I shall not recover."

Cross-examination by Mr. Beach.—At what stage of your visit did he make this statement?

Witness: It was perhaps half an hour after I first saw him.

Q. Did you give him any encouragement that he would recover?

A. I told him he ought not to despair; that he might recover; I was then adopting remedies to alleviate his pain; the remedies did not relieve him, as I could perceive; I am not able to tell whether they did relieve him or not; the symptoms continued much the same way; I can't say from knowledge that the pain continued as acute after the medicine was given him as before; there were intervals when he had less pain; he continued afterwards to take my medicine and I continued to labor for his recovery; his decease was sudden; he lingered from two and a half to three hours after he told me he thought he should not recover; the conversation between deceased and myself occurred very soon after I went; up to within a few minutes of his death he continued to converse; half an hour, certainly; he continued to help himself in and out of bed up to about half an hour previous to his death; I do not recollect that a minister was sent for; his mother knelt down by the bed and prayed; this was perhaps half an hour previous to his death; we had concluded at this time that he would not recover; I did not express the apprehension; there was a great deal of confusion among the friends and family at this time; myself and associate, previous to this time, perhaps an hour or an hour and a half, had definitely concluded that he could not recover; I understand Lanagan to have been an Irishman.

Direct examination resumed.—When I say "we concluded," I mean Dr. Skilton and myself, upon consultation between us; we expressed that opinion to each other; I formed an opinion when I first saw him that he would not recover; and I con-

The People v. Robinson.

tinued of that opinion throughout; it was a case of violent symptoms; an aggravated case; there were occasionally appearances of less pain than at others; such is the case in all pain produced by poison; it was after the remark that he made that "the villain had destroyed him," that I told him he ought not to despair; I do not think that during the time I was there he expressed any hope or expectation of recovery; when I told him that he might recover, I did not believe he would; I do not recollect that he spoke on the subject whether he would recover or not, but once; I do not remember that the remark he made about "the villain had destroyed him," was made more than once; do not recollect that he said any thing about being "done for;" I think "the villain has destroyed me," is the precise expression used by the deceased; I had conversation with him in regard to the origin of his ailment; the conversation was before he stated to me his belief that he would not recover; I do not remember distinctly whether he spoke of the origin of his ailment after he told me he thought he should not recover; he was lying on the bed when I first came in; I think he was vomiting when I first came in; I did not ask him what was the matter with him; my medicines apparently produced no effects upon him; the family were conversing about the matter when I came in, and I heard the story as to his ailment part from him and part from the family.

Mr. Hogeboom to the Court: I propose now, your Honor, to ask him from what source he derived this poison; by whom it was administered, and under what circumstances. I suppose it is advisable to put the questions, on the ground that here was a party about to die; the circumstances were of recent occurrence. What he then said, was a dying declaration, and therefore he had no motive to misrepresent the truth. The impression produced on the mind of the physician by the symptoms was that the deceased would not recover, and such was the belief of the deceased. The question was as to the admissibility of this testimony. He supposed it was admissible under the strict rule of the courts, in such cases. The true

The People v. Robinson.

rule would be, he thought, to admit these declarations, and then instruct the jury the weight to which they were entitled.

Judge HARRIS: I do not think the declarations would be admissible. The man himself said he thought he should die; the physicians did not apprise him that he was likely to die, but encouraged him to hope that he would recover. Now, Lanagan may have had the impression that he was going to die; but to constitute dying declarations, the person making them must be convinced that he was dying; must see death staring him in the face. Mr. Lanagan was not in this state, for when he expressed the belief that he would not recover, his medical attendants encouraged him to believe and hope that he would. It would not be safe, under the circumstances, to admit the declarations.

Direct examination resumed.—I do not think that at any time either Dr. Skilton or myself told deceased that he could not recover; besides myself and Dr. Skilton in the room with Lanagan, were his mother, father, brothers, sisters, and children; I think he spoke to his wife during his illness; do not remember positively; I was not present at the coroner's inquest.

Cross-examined by Mr. Beach.—I consider of the symptoms named, the intense pain of the stomach was peculiar to poison. There were others: burning sensation at the throat; constant retching; severe evacuations from the bowels; cramps, often; great prostration of the system; these comprise pretty much all the symptoms; the incessant retching and severe burning sensation at the throat are not common to other diseases. Independent of the severe burning of the throat, all the other symptoms mentioned are common to a variety of other diseases; this burning at the throat, I do not think is limited to any particular variety of poison; in all cases of suspected poison I understand it is customary to analyze the contents of the stomach; it is done by the faculty to satisfy themselves as to the cause of the death; without that, it is not I think in the power of our profession definitely and certainly to determine the cause of death; I have had occasion to attend a case of

The People v. Robinson.

cholera; in those cases there was great thirst, and a complaint of irritation of the throat, but not as severe as is common to cases of poison; I have found in the course of my practice that the recovery of the patient depends much upon the constitution, the will, and power to endure; severe retching, great pain in the stomach, &c., are strong symptoms of cholera, as is also, sudden and severe prostration, if accompanied by other symptoms, such as rice-colored evacuations, severe cramps, &c.; these evacuations do not always result from the progress of the disease and rapid dissolution of the patient; we should not always expect death to follow such evacuations; we find these rice-colored evacuations in no other disease than cholera, that I am aware of; they may sometimes occur in cholera morbus, a disease that assimilates to cholera; I would not like to give a definite opinion as to whether a safe conclusion as to the cause of this man's death, could be arrived at without an analyzation of the stomach; I understand the stomach was analyzed; I attended deceased's family for four or five years previous to his death; he was not a man of vigorous constitution; his habits I believe were regular, and he was a temperate man as far as I knew.

Direct resumed.—He was able to attend to his ordinary affairs, I believe, up to the time of this transaction; I was in the habit of seeing or meeting him most every week. He was about thirty-five years of age at the time of his death; the symptoms he exhibited were not those of cholera; the evacuations in no respect resembled cholera; I think I could pronounce with confidence that he did not die of cholera; independent of analysis I think I have a decided opinion as to the cause of his death, and it is such as I have named.

By Mr. Beach.—My question to you, doctor, was whether, without an analysis, you could form a satisfactory conclusion as to the cause of this man's death; did I understand you correctly?

Witness: You did. My opinion as to the cause of the man's death was founded to some extent, but not altogether, upon what I heard from the friends and family of the deceased.

The People v. Robinson.

Mr. Beach.—Then, doctor, I understand you to say, that judging from the symptoms alone, you could form no decided opinion as to the cause of death; but taking the symptoms together with what you heard from the family and friends, you did form a decided opinion.

Witness: I formed an opinion independent of what I heard; it is the invariable custom in case of suspected poison to analyze the stomach.

Mr. Beach.—Judging from the symptoms alone in this man, and without analysis, do you think you can pronounce it a case of unmistakable poison?

Witness: I think I can. It is the opinion of most medical writers of celebrity that no reliance can be placed on these external symptoms for the detection of poison; and hence results, as a general thing, this custom with our profession, of analyzing the stomach to detect poison; I still think I can express a decided opinion as to the cause of this man's death; to a certain extent I concluded poison had been administered; to a certain extent is what I mean, which might be verified by a *post mortem* examination; I should be satisfied in this case without such examination.

Direct resumed.—The object of the analyzing the stomach may be both to ascertain the presence of poison, and the particular kind of poison; I wish to be understood that to analyze the stomach in cases of suspected poison is the general custom, not the invariable custom.

By Mr. Beach.—Did you ever know a case of suspected poison that was not followed by an analysis of the stomach?

Witness.—I never knew of one.

Mr. B.—Then, as far as you know, it is the invariable custom, is it not?

W.—It is.

Avery J. Skilton, sworn: I reside in Troy; am a practicing physician; have been for a number of years; saw Timothy Lanagan before his death; saw him on the twenty-fifth of May, 1853, the day on which he died; I reached his house about five o'clock in the afternoon; Dr. Adams was not in the house

then; a great number of people were there; Mr. Lanagan was in the back room; when I got in he was on the bed; his skin was somewhat livid; his pulse very feeble; he was rolling and retching on the bed, which indicated pain; he complained of severe pain, burning at the stomach and in the throat; sickness at the stomach, retching constantly, most; frequent vomiting; the discharges from the stomach were not uniform; some of them had a dark appearance; he had discharges of bowels, but I don't recollect definitely about them; I believe they were partly bloody; from the symptoms exhibited by Lanagan, and independent of any thing I learned from the family, I believed he had been taking mineral poison; I had no doubts about it; I went there thinking he might be relieved, but after seeing him had less hope; I recollect of his saying only that he could not live; this is the only expression I heard him make on the subject of dying; he did not state why he couldn't live; said nothing in my hearing as to the cause of his illness; was present at his death, but did not remain at the house all the time from the time I first went to the house; I was present at the *post mortem* examination; that showed that the stomach was highly inflamed, in some patches and parts more than others; no chemical tests were applied to detect the presence or absence of poison; the appearances corresponded with the symptoms which led to my conclusions before he died that he had been taking mineral poison; near the lower part of the stomach was what appeared to be a white powder; in the intestines there was a greater quantity of mucous than usual, mingled with a yellow substance; everywhere, from the pit of the stomach the cyphuses were more highly inflamed; the large intestine, or colon, was singularly blanched, and led me to think of the fact of his having passed bloody stools; there were no tests applied there to the white powder — no chemical tests; the white powder was enveloped in mucous; and therefore it resembled white powder, like flour, or arsenic; arsenic is white — white powder; from this examination, coupled with the symptoms previous to death, I had no doubt he died of

The People v. Robinson.

mineral poison: I fully believe the poison was arsenic; the coroner's jury and coroner were present at the *post mortem*; Dr. Seymour, called by the coroner, was also present.

Cross-examined by Mr. Olin.—Taking the whole time I was present at the house it was not less than an hour; I was not in the room half an hour the first time, but in the house some time before I got in the room; I made examinations of the symptoms all the time I was at the house; the great soreness and burning sensation of the throat are rather peculiar to arsenic but can be swayed by circumstances some; for that symptom we rely principally upon the statement of the patient, except as we judge from the character and appearance of what he vomits. His calling for cold water was an evidence of the burning sensation; it does not attend ailments occasioned by other poisons; calling for water alone is not a decisive test of the presence of arsenic; there was no other symptom, aside from what I have mentioned, that indicated arsenic; one is more likely to have cramps from arsenic than from other poison; can't say that cramps attend poisoning by any other poison than arsenic; do not know but our medical writers say so; Beck, in his work, says that in cases of poisoning by arsenic, the fact can be safely determined only by finding the poison in the stomach.

Question by the counsel: Do you say that, by simply examining the symptoms of the patient, you can tell if he has been poisoned, and if poisoned, whether it was a mineral or vegetable poison, to a certainty.

Answer.—I can, satisfactorily to myself—without doubt; the most approved writers upon this class of subjects are Guy, Christison, Beck and Orfila; Orfila was a distinguished chemist; Beck was a medical man; I can't say that either of these writers say that the symptoms above are infallible tests; it is stated again and again, and so have I stated again and again, that symptoms should not be relied upon in a court of justice; there is more certainty in a chemical analysis; it is so held in courts of justice and medical jurisprudence, and is so in fact; symptoms are sufficient to satisfy me; that the test by symp-

The People v. Robinson.

toms is as certain as by chemical tests, I have not stated; in the *post mortem* examination of Lanagan, there was nothing to indicate that the poison there was arsenic, except that the powder there found was white; the white powder was distinctive evidence, though not infallibly distinctive of mineral poison; the yellow substance in the intestines was another evidence of the presence of mineral poison, though not a certain indication; I fully formed the opinion, as a medical man, that Lanagan's was a case of poison by arsenic, upon the three grounds that the powder there found was a white powder, it was not crystalline, and the yellow substance in the intestines; of the fact I had no doubt; I was not present at the chemical analysis of the stomach; do not know whether there was one; heard there was to be one; at the *post mortem* examination the stomach and intestines were taken in charge by the coroner, Dr. Bontecou.

Dr. William P. Seymour sworn: I am a practicing physician; reside in this city; have practiced here some five or six years; was present at the *post mortem* examination of Mr. Lanagan; did not see Mr. Lanagan on the day previous to his death; think the examination took place the day after his death, and think it took place in the afternoon; the *post mortem* was made by Dr. Bontecou and myself; Dr. B. was coroner, and I assisted him; Dr. Skilton was also present; the stomach presented all the appearances of very severe and very acute inflammation; I think there was a small quantity of fluid in the stomach; nothing else that I observed, except the white powder spoken of by Dr. Skilton; the quantity I could not tell by weight or measure; it was distributed over the first bowel; saw that the mucous about the first bowel was slightly tinged with yellow; supposed it was a discoloration of the unusually thick mucous; the inflammation was in all portions of the stomach; some portions more than others; this inflammation was so severe that in my opinion, as a professional man, it was sufficient to cause death; it was my opinion that the deceased came to his death by an irritating poison; I have no doubt he died from the effects of poison; Dr. Bontecou placed the

The People v. Robinson.

stomach and intestines in glass jars; do not know how many glass jars were there: Dr. B. had other jars there, and one already contained the stomach of a woman examined the same day, that of Miss Lube, who died about the same time as did Lanagan.

By Mr. Beach.—The inflammation of which I speak was necessarily produced by poison; I have no doubt Mr. Lanagan died from the effects of that inflammation.

By Mr. Van Santvoord.—Did not detect other evidences of disease in the stomach, except the inflammation; there was sufficient of the powder in the stomach to enable the doctor to scrape it up with a knife, and lay it on a piece of paper; there was not a teaspoonful visible; the probability is there was more in the lower portion of the bowels, which was not opened.

Ann Lanagan, sworn: I knew Timothy Lanagan in his lifetime; he was my husband; he is dead; he lived in the upper part of the city, corner of River and Rensselaer streets; we had lived there not quite twelve months at the time of his death; we went to live there in October, and he died on the 25th of May; I knew Mrs. Robinson; was not acquainted with her when we moved there; we had been there two months before we became acquainted; she lived directly across the street; saw Mrs. Robinson on the 25th of May, about six o'clock in the morning; saw her in my own house, in the grocery; there was no one in the grocery but myself at the time she came in; can't say how long she remained; called for a quart of beer and a pound of soda crackers; strong beer, ale; I furnished her with it; she took it out of my place with her; my husband was not out of bed at the time; saw her again about eight o'clock on the same morning; she was in the grocery again; at this time there was an old man named Haley in the grocery, who lived with Mrs. Robinson in her house; she (Mrs. R.) asked him what had kept him so long; she had sent him, he said, for the loan of two dollars; I had not let him have it; that was the first thing she said, "What kept you so long?" I answered that I had delayed him, that I had no money in the house, and that I would send to see if I could not borrow some for her;

The People v. Robinson.

she asked me if I was so scarce as that of money, and I said yes; she said she was sorry, but she would lend me a hundred dollars to-morrow; she left the place and went away; I should say she was in the grocery about ten minutes or a quarter of an hour, that time; she came into the grocery again about eleven o'clock in the forenoon; she told me she was in very great trouble; I asked her what the trouble was, and she told me that she had got a telegraph a few minutes before, that Robinson got hurt on board of the cars; a man was standing by, who told her not to fret; that if his wife was dead in the west, he would not fret until he saw her; this man's name was William Welch; she turned away from the counter, and went inside in the kitchen, which was right back of the grocery; there was a glass over the door leading from the grocery into the kitchen; she stopped there for some time; there was a lot of men sitting inside when she went in; they soon began to talk very loud, and I could hear Mrs. Robinson's voice; I do not know what was said; I was in the grocery; my husband was not in the house at that time; I went into the kitchen before she left; I told her to go home, that it was no place for her to be there among a lot of men; she left after a little time; no other women were in there at the time; saw her again that day about one o'clock; she came through the grocery into the kitchen; at this time my husband and Catharine Lubee were in the kitchen; Catharine Lubee's sister was married to my brother; she was stopping with us at the time; she came from Albany on a visit to see us; at this time my husband, Catharine and myself, were sitting down at dinner; she said, "Are you at dinner?" I said, yes; there was an egg on the table, and she asked, "Whose egg is that?" my husband made answer that it was hers if she wanted it; she took the egg in her hand, and my husband got up and went into the grocery. She sat down to eat the egg, and I took a knife and peeled a potatoe for her, and she ate the egg and the potatoe; when she had done, she said, "You, Mrs. Lanagan and Catharine, must have a glass of beer from me." I told her I did not want any beer, that I was mostly tired of beer, and that I didn't want to drink

The People v. Robinson.

any beer; Catharine made an answer, and said she did not like beer; she asked me if I had got any sugar in the house; I told her I thought she didn't want any sugar; that she got nine pounds of sugar the week before; she said she didn't want it to take home, but to put it on the beer to make the beer good; I took a saucer, went into the store, and brought in some sugar; it was white powdered sugar. After bringing in the sugar, I went out for the beer; brought in some in a quart measure, and poured it into two glasses; Mrs. Robinson was walking backwards and forwards through the floor with the saucer in her hands; I did not bring in enough beer the first time to fill the two glasses; she said she should have the two glasses full; I went back and brought in some more beer from the grocery; when I came in with the second beer, Mrs. R. was after pouring the sugar into the two glasses; I poured in the remainder part of the beer and filled the glasses; I sat down to the table to take my glass of beer; she was standing by the side of me; there were two glasses of beer; the other stood before Catharine; I noticed a little foam on the top of my glass, and I thought it was some dust that was in the sugar; I took a teaspoon in my hand to take it off; Mrs. R. took the spoon out of my hand and said, "Don't you do so; that's the best of it." My husband called on me and I went into the grocery; I did not wait to see what was done with the spoon; when I went out my beer was on the table; my husband said I should go in and wait in the grocery; that he wanted to go down town as far as Mr. Morrison's. I went into the grocery, and turned around to the door and saw the glass of beer in my husband's hand; he was just putting it up to his lips to take it; heard nothing said; Mrs. Robinson left in a few minutes afterwards. Soon my husband came into the grocery; I asked him to stop a few moments; at the time my husband had the beer in his hands, Mrs. Robinson stood between himself and Catharine Lube, near the table; did not see where the other glass of beer was at the time. I had observed a piece of white paper in Mrs. Robinson's hand; saw it when she was eating the egg and the potatoe; don't know whether Catharine Lube drank any of

The People v. Robinson.

the beer, any further than she told me; Mrs. Robinson did not drink any of the beer at the time to my knowledge; after leaving the kitchen for the grocery I did not return to the kitchen until after Mrs. R. came; had no conversation with her as she passed out; she said nothing to me; she passed out through the grocery, and before my husband did; my husband remained a little while to put down some charges which I told him of in the forenoon; when I had told him what the charges were, I left the grocery and went into the kitchen, and when he was ready to go, and said I was to come, that he was going down to Mr. Morrison's and Lord's; when I returned into the kitchen the glasses were on the table empty; my husband did go down street and I went back into the grocery. Catharine came to the door while my husband was in the grocery, and asked him how did he feel after the glass of beer; this was after Mrs. Robinson left, and was after I had told him to enter some things in the book. [To the question, what did your husband say in answer to Miss Lubee's question, "how did he feel after that glass of beer," the counsel for the defence objected. Objection overruled, to which decision the defendant's counsel excepted.] He said he didn't feel very comfortable. Miss Lubee made no further remarks about it. Do not know what time it was when my husband left for down street; he came back, as near as I could state, about three o'clock; had seen Mrs. Robinson after my husband left and before he came back; she came over to our place; can not state how long after my husband went away that she came over; she came into the kitchen through the grocery; Catharine was lying on the bed at this time; she was sick; she went over to the bedside and asked Catharine how she felt; she said she felt very poorly, and that she (Mrs. Robinson) put something in the beer that sickened her; Mrs. R. said she put nothing in it but something to do her good; my husband came in at the time, and I don't recollect that any more words passed. Mrs. Robinson asked me for a glass of beer before my husband came; I told her that I thought she didn't want any beer; there was a young man in at the time, and she asked him if he would

The People v. Robinson.

have a glass of beer; the man said no, he didn't drink beer. My husband came in at that time, and laid down on the sofa; he was very bad, hardly able to speak; I turned to him and asked if he was sick; Mrs. Robinson was standing by; he said "Send for the doctor immediately, I am done for." I did send; sent William Buckley, a man who was in the house; I turned around to her (Mrs. Robinson) and said, "What have you done! you have killed the father of my children." She said, "Oh, no, I wouldn't do any such thing!" She thought to go over to speak to him, but he put out his hand against her, and told her to go; I put my hands against her and pushed her towards the door; Lanagan's mother also pushed Mrs. R. towards the door, and helped to put her out of doors. My husband, when he put his hand up said, "Go, woman." She then left the house. Before my husband had returned, the old man Haley, came over, and said that Mrs. Robinson wanted me over to her place; I told him I couldn't go. Mrs. R. did not come back to our house after she was there; did not see her afterwards.

Question.—Do you see her now? Witness could not identify Mrs. R., and counsel requested that she raise her veil.

My husband died at $\frac{1}{4}$ to seven o'clock the same evening, and Catharine Lubeer died at five o'clock the next morning; I saw her dead; she died at the house of Mr. James Lanagan; Dr. Adams and Dr. Skilton attended her. My husband did not leave the room after he came in from down the street; he got no better before he died; a French clergyman, whose name I forgot, was present before my husband died; he is not living in town now; he was at the house when the doctor was; Mr. Lanagan's mother had sent for him. [Counsel renewed the offer to prove the dying declarations of Mr. Lanagan. Court: Do not think it will answer.]

I became acquainted with Mrs. Robinson about two months previous to this occurrence; recollect a disturbance at our house in which Mrs. R. was concerned; it was at a dance at our house; I told her to go home myself on this occasion; I told her so because a young man asked her to dance; she wouldn't dance, and then she insulted the young man; Mr.

The People v. Robinson.

Lanagan and myself were by at the time. What passed between the young man and Mrs. R. I can't say. They were at the door leading from the grocery to the kitchen, and I was in the grocery; she came to the counter soon; I was behind it; the young man also came to the counter; they talked for some time; I can't say what they were talking here; she said that he insulted her, and she pulled her pistol out and said if he ever insulted her again she would blow his brains out. My husband came, and said he didn't want any noise in the place; that they must leave from there; that he would have no more noise there; I went to her and told her to go home; I went along with her to her own door; told her to keep in her own place and nobody would insult her; she came outside the door again that night, but did not come into the grocery; she called for the young man that insulted her (Smith); she asked if Smith was in there; she knocked at the door and asked the person who opened it; Smith went out, and I heard nothing further.

Can't say when Mrs. R. was next at my house; whether it was the next morning or two mornings after; she said I was a very mean woman, and that I kept rowdies in my house to insult her; she said she would get us turned out of the place, and would not let us get any license to sell; I told her that I didn't want any bother with her, to go home; she kept still talking; my husband got out of bed in the back room, and told Mrs. R. that he wouldn't stand such noise, and that she must leave the house; she said she wouldn't leave the house for him; she asked him if he wanted to turn her out when she was so good a customer; he said he didn't want her custom; he wanted to have her go away; she said she wouldn't leave; that he would have to get a constable to turn her out; I told him to go inside, and I would send her away myself; she left in a few minutes afterwards.

When I went into the grocery to get the sugar in the saucer, I got the sugar in a small box where we usually kept the sugar. The box and the sugar were taken in charge by the

The People v. Robinson.

coroner that night. Previous to the 25th of May, and before drinking the beer, my husband was well; nothing was the matter with him. The beer was of the same kind that we were retailing out of the store daily.

Cross-examined by Mr. Pierson.—I first saw Mrs. Robinson about two months after we moved into our place; it was at my grocery; she came to trade; she continued that trade down to my husband's death; myself and husband were on good terms with Mrs. R. until the morning she came in to abuse us; that was the morning after the dance; can't say what month the dance was; don't think it was months previous to the beer occurrence; I think the dance was in the spring; I can't tell whether it was cold or warm weather; there was no snow on the ground; these dances were not frequent at our house; I don't know that we had any more than another dance before that; we have had no dances since; the Mr. Smith I speak of as having a difficulty with Mrs. R. resides in River street; his name is David Smith; he was the only strange person there; the others were my friends. Among the latter were Dennis Lanagan, John Lanagan and William Buckley; we had a fiddler; forget whether it was a fiddler or a piper; don't know his name; Mrs. R. came to the grocery to trade on that evening; she wanted something out of the store.

Since my acquaintance with Mrs. R. I have occasionally visited her; my children went to visit her; the children's ages vary from 13 to 8 years old; after the dance, I was on good terms with Mrs. Robinson; she stopped away for some time after that, but she came back; when I requested Mrs. R. to go home, when she had the difficulty with Smith, I had no unkind feelings against her, and she manifested none towards me; I can't tell what the language Smith addressed to her was; did not hear the words; Mrs. Robinson was at our grocery nearly every day until the dance time, when she stopped away three weeks; Mrs. R. kept an account with us; she paid her bills when requested to; she owed us \$14 at the time of my husband's death; part of this has since been paid; she used to borrow money of us, and always paid it again; can't tell

The People v. Robinson.

how much her trade amounted to in a month. On the morning she called to borrow the \$2 I had the money in the house, but did not want to let her have it; did not say on the stand that I did not have the money in the house, but did tell Mrs. Robinson so; am not in the habit of lying; it was not much lying what I told Mrs. R., for I did not want to refuse her or let her have the money; the old man Haley told me he didn't see what she wanted to do with the money, for she had every thing in the house that she wanted.

Did swear on the coroner's inquest that there was no cause of enmity between myself and husband and Mrs. Robinson; said nothing before the coroner about the difficulty at a ball; the day on which Mrs. Robinson told me about Robinson's death by the cars was the same day on which my husband's death occurred; at the 12 o'clock visit she ate an egg and a potato; she said we should have a glass of beer from her; I declined; Miss Lubee said she didn't like beer; she said she would not leave the house until we had the beer; we had never had any arsenic in our house; I had never seen any arsenic; my beer was all ready to drink when my husband called me, and I went to wait upon him; Miss Lubee asked Mrs. Robinson, if she wouldn't have a glass of beer; I did not about this time drink a glass of brandy and water; did not say that, having got tired of beer, I would take some brandy; Miss Lubee had been at our house seven or eight days at the time of this occurrence; she was twenty-five or twenty-six years of age, unmarried, and resided, when at home, in Albany; she did not lodge with us; she stopped in the day time with me, and went to Mr. James Lanagan's to lodge nights, as I had no bed for her; Mrs. Robinson knew Miss Lubee; she got acquainted with her at my place; they conversed together on friendly terms; Mrs. Robinson came for Miss Lubee at our house once; and afterwards I went over and brought Miss Lubee home; think this was about a week before the death of my husband; I got the sugar from the box in the grocery; the box was open; the box stood inside the counter within reach.

The People v. Robinson.

Mrs. Robinson, when invited to partake of the beer, said she didn't feel like taking any at present; do not know that Mrs. Robinson did drink of the beer with Miss Lube, and did not know that she was sick and vomited after the beer was drank; don't recollect that when Haley came for me, after the beer had been drank, to go over to Mrs. Robinson's, he said that she (Mrs. R.) was sick; the paper which Mrs. Robinson had in her hands was white, and she held it on her two fingers; I can't say whether it was folded or rolled up; it was clean white paper; it was a little bit before he died that he told me to make the best of it, that he was done for; it was before the doctors came in; I was not with Catharine Lube when she died; know at what time she did die only from what I was told at the time; the names of the men who were in the back room, and with whom Mrs. Robinson had the talk in the back room on the day my husband died were William Buckley, Patrick Galligan and others; I know not what they were doing there; don't know whether they were playing cards there; they had some drink there; I had known Catharine Lube about three years; she had before visited us in Troy; she lived with me thirteen weeks caring for her sister, who was in a dying way; this was before we kept the grocery; this might have been a year before we kept the grocery; this was her first visit to us since we had kept the grocery; I can't tell you from whom I heard that Mrs. Robinson was sick; I think I heard of it the day following my husband's death; can't be certain; Haley did not say she was sick when he came over; knew that Mrs. Robinson was in jail the day following the death, but heard she was taken sick before going to jail.

William M. Ostrom.—Reside in Troy; I am a druggist; that was my business some time previous in the month of May, 1853; my store at that time was at the corner of River and Federal streets, near the bridge, considerably south of the residence of Mrs. Robinson; I did not know a Mrs. Robinson at that time; should know her now, if she would raise her veil. That is the lady sir; she was in my store several times in the month of May, 1853; in that month she purchased arsenic at

The People v. Robinson.

my store; it was in the form of a white powder; it was between the 10th and the 25th of May; she bought, as near as I recollect, two ounces; she was also at my store on the 25th of May, between five and seven o'clock, about half an hour previous to her arrest; had conversation with her at that time; when I came in from tea, I found her in the store very much excited; she said she was in trouble; had been charged with poisoning a couple of persons; I think she mentioned Lanagan's name for one, and said they resided opposite where she did; I asked her why they should suspect her of the crime; and she said she supposed it was out of revenge, because she would not lend them a hundred dollars; that she did not want to draw that amount of money out of the bank in the absence of Mr. Robinson; she said she was very much in fear of the neighborhood, and wanted my advice as to what she should do to be protected; I referred her to the chief of police, Amasa J. Cope; told her it was his duty to send a posse of officers with her if it was necessary to see that she was protected; she had a revolver with her on that occasion; I probed it with the handle of a pen, I found one barrel loaded; there were three or four percussion caps on the hammer of the pistol, but the lock was so rusty that I doubt if it could be fired off; I think the cap on the barrel loaded, the one that I probed, was in good order; on the Saturday evening previous to the arrest, Mrs. Robinson was at my store, and had a pistol with her; it was about 10 o'clock in the evening when she came in; on her visit to my store on the 25th, she said she had gone over to the grocery in search of her gardener, and that while there she was about drinking beer with Mrs. Lanagan and others, there was some confusion about the handling of the tumblers and that Mr. Lanagan was taken sick, and they accused her of putting poison into the beer.

Cross-examined by Mr. Beach.—I furnished a written statement of the transaction I have related, about the time of the meeting of the first grand jury after the arrest was made; I can state that one of the barrels of the pistol was charged; can't swear that more than one was; I think that the rust on

The People v. Robinson.

the other caps rendered them useless; I first spoke of her calling upon Mr. Copp for protection; she did not voluntarily give me the pistol; I requested it, and she gave it to me promptly; she said she wanted the arsenic at the time she purchased it (between the 10th and 25th of May) for killing rats; that she was living in the vicinity of Boutwell's Mills, and rats were abundant there; this was voluntary on her part, while I was putting up the article; I think she got the arsenic within two or three days of the 10th of May; she called in the store again the same day, and within an hour's time after the purchase of the arsenic; she was very much excited at the second time she called; I never noticed anything peculiar in her appearance only when she called the second time after the purchase of the arsenic, and on the 25th; this last time she appeared fearfully apprehensive and restless; she looked around apprehensively; did not appear like the same woman, either in dress or manner; she was standing when conversing with me on the 25th; she was very nervous, and was not in one position any time, walking all over; I had noticed in her former visits she had the air and appearance of an accomplished lady; on the 25th she was not well dressed; it was disordered; her language was more bold; only on one occasion, previous to the 25th, had I noticed this change in her appearance; this was on Saturday evening when I saw a revolver, or the muzzle of one, in her dress.

To Mr. Hogeboom.—On this Saturday evening I speak of, judging from her appearance, flushed countenance and excited manner, I have no doubt she was in liquor; when I saw her on the 25th, I don't think she was so much in liquor as on the Saturday evening previous; I can't say that she was in liquor at all at this time, because there were other causes which might have caused her excitement on this last occasion; I mean the accusation; the arsenic I sold her was wrapped up in two papers and both were labeled "poison;" both wrappers were white.

To Mr. Beach.—On the Saturday I speak of, her excitement and mode of dress, her flushed countenance and language, led me to believe she was intoxicated; her language was not as

The People v. Robinson.

polished, not as good as formerly; having a revolver was another reason why I thought she was intoxicated; she made use of no vulgarity that I recollect of; the excited state of her mind, and the flush in the face, might have been produced by other causes than liquor; they might have proceeded from a deranged mind connected with a diseased state of the bowels.

To Mr. Hogeboom.—I pretend to have no particular knowledge of the subject of the symptoms occasioned in mind or body by mental excitement not superinduced by liquor.

To the Judge.—The time she returned to the store after purchasing the arsenic, I noticed she was flushed in the face.

To Mr. Beach.—She was a florid complexion usually.

Dr. Skilton, recalled.—Was called to see Catharine Lube; saw her in North First street, at James Lanagan's; saw her some twenty minutes after I first saw Lanagan; not far from five o'clock; Dr. Adams was not present; was with her for some ten minutes; saw her after Mr. Lanagan's death; very soon after; was with her about ten minutes; her symptoms indicated mineral poison; they were similar to those of Mr. Lanagan's but they differed in degree; was present at her post mortem examination; that indicated the same as in Lanagan's case, death from mineral poison; I know of no chemical tests in her case; judging professionally, I have no doubt she died from mineral poison, and that that poison was arsenic; it is not a general custom of physicians in case of poison to analyze the contents of the stomach; it is their custom to do it when they are ordered to do it; I have had some familiarity with cases of poisoning; I recollect the priest being in the room with Lanagan when I got there; do not know his name.

Cross-examined.—It is the general custom of coroners in these cases, to order the stomach to be analyzed; it is done on their order, and not by physicians voluntarily.

Charles Burns, sworn.—Resides in the city of Troy; was an officer at the time of Mrs. Robinson's arrest; I made the arrest next door to Owen Clark's drug store, above the Mansion House; I believe the arrest was made the same day the alleged offence was committed, between six and seven o'clock

The People v. Robinson.

in the evening; Mrs. Robinson when I went into the store asked me if I was a police officer; I told her I was; I arrested her, and on the way to the jail we laughed and joked; I visited her house afterwards in company with Bowman, Bontecou and Camp; found no one on the premises; she had given me the key of the door; went in the front door; we searched the house through; we found there only Mrs. Robinson's household furniture and clothes; I found some arsenic under the corner of the carpet; it was done up in a piece of white paper; Dr. Bontecou took it; it was found near the head of the bed, in the middle room, where there was a bed; it was close against the wall; the carpet was tacked down; when I arrested Mrs. Robinson, I found a couple of pistols on her person; Dr. Bontecou took them in charge; two of the barrels of one of the pistols were loaded; we had to take them from her; Mr. Price the sheriff, and George Kennedy and myself took them away from her; this was at the jail; I did find a piece of white paper in her pocket at the time of the arrest; there was nothing in it, and I threw it away.

Cross-examined by Mr. Beach.—I did not observe what she was doing in Perkins's shop at the time I arrested her; I saw her doing nothing; we walked to the jail; on our way to jail she said she looked rough and dirty going through the streets, but it was a muddy, rainy day; I thought she talked lightly; she asked me if I was not going to take her to Robertson's office; I told her yes; this was in Second street near the Mansion House; we went down Albany street to Fifth, and from thence to the jail; our course was almost directly from Robertson's office; she made no remark in regard to the course I was taking her; the carpet was nailed down over the paper of arsenic that we found at the house; there was a paper of Spanish flies also found there; there was a box of jewelry, a watch, and a locket found there; the pistols I took from her looked pretty rough; she carried them in her bosom; she resisted giving them up.

Mr. Beach.—Well, she wishes to know what became of her locket?

The People v. Robinson.

Witness.—Dr. Bontecou took charge of every thing found, including the key of the house; when we got to the corner of Ferry and Fifth street, I pointed to the jail and told her there was the place; there was quite a party of fellows on Murphy's corner, and she asked me to let her walk up the hill a little ways, while I should stand on the steps; I allowed her to do so; she walked up the hill a little way, returned immediately and walked into the jail hall; she seemed surprised to find herself in the jail; I speak of the powder found in the paper at the house as arsenic, not from any knowledge of my own but what others told me.

To Mr. Van Santvoord —When I went into Perkins's shop I said "good day" to Mrs. Robinson; this was all that passed, until she asked me if I was a police officer.

To Mr. Hogeboom.—Murphy's corner is corner of Fifth and Ferry; she walked up the hill perhaps half a block; not out of my sight; she did not state why she wished to walk up; she expressed no surprise in words in finding herself in jail; when I told her she was in jail she said nothing; I had never seen Mrs. Robinson before the day of the arrest; she looked startled, as most any body does who goes to jail.

Burr Lord, sworn: Reside in Troy; follow the grocery and provision business; and am one of the firm of Morrison & Lord; our store is 399 River street; knew Timothy Lanagan in his life time; he was at our store on the 25th of May last; he was there twice; he was there about nine o'clock in the morning, and between one and two o'clock; in the afternoon he came down, I suppose to look at some beef; he remained five or ten minutes; he made no purchase; he said he was sick; said he was very sick; stated nothing of the nature of his sickness; he looked sick; did not state where his pain was; his eyes looked bad, and his lips looked very blue; he left the store and went towards home.

Reed P. Bontecou, sworn: Reside in Troy; I am a physician by profession; have been a physician about nine years; lived in Troy in May last; was the coroner of this county; held an

The People v. Robinson.

inquest over the body of Timothy Lanagan; a verdict was rendered by the jury. This inquest was held on the evening of the 25th day of May, 1853; I made a post mortem examination of the body; this was done at the house of the deceased, the following day; quite a number were present; I think the jury were, as well as Dr. Skilton and Dr. Seymour. I was associated with Prof. Dakin in making an analysis of the stomach; I took the stomach from the body myself; we analyzed the contents of the stomach during the latter part of May and in the month of June; the analysis continued two or three weeks; we applied chemical tests with a view to ascertain the substances which the stomach contained; we found poison in the stomach; it was arsenic. We applied several tests; they all resulted in showing arsenic; we found forty grains of arsenic in the intestines, which had passed through the stomach; there were enough to produce death; I can state professionally that he died of arsenic. Saw and took charge of a box of sugar at the house of Lanagan; it was white, granular sugar; I got the sugar from Mrs. Lanagan; it was behind the counter, in the store part of the house, on one of the shelves; she told me it was all the sugar there; saw no other sugar. The box was in such a situation that it could not be touched, except by a person getting over the counter; of the sugar there was perhaps three or four pounds; I took possession of the sugar and kept it until the time of the analysis. Professor Dakin and myself analyzed the sugar; we tested for arsenic; discovered none; there was none; we discovered no foreign ingredient. In analyzing the sugar we applied one or two tests previously applied in analyzing the stomach, and those were the most delicate tests, the proper ones. I am not a professional chemist; Professor Dakin is. We tested the beer at Lanagan's by drinking it; it produced no unpleasant effect; it didn't kill me; there was no poison in the beer; some of the jurors drank it, as did one or two other persons; I know of no injurious effects being produced; it was drawn by Mrs. Lanagan from a barrel in the store; I saw her draw it. I went to the house of Mrs. Robinson; I was not acquainted with Mrs. Robinson previous to this

The People v. Robinson.

transaction; had never seen her; her house was nearly opposite, a little above the place of Lanagan's. There were many things in the house usually found in dwellings; we found arsenic there; it was in the back parlor. There was a bed in this room; the arsenic was in the southeast corner of the room, under the carpet, between the bed and the south wall; it was wrapped up in a paper somewhat soiled, and as near white as may be; the arsenic was not done up in regular form; it was not in apothecary style; there was one drachm, about sixty grains, of the arsenic; I took a portion of it; it was the article commonly known as arsenic; we tested it and found it to be arsenic. On the 25th of May I saw a person named Catharine Lubee, alleged also to have been poisoned; saw her at the house of James Lanagan, a relative of the deceased person; it was about nine o'clock in the evening of the 25th; the coroner's jury was also there; I took them there for the purpose of taking her evidence on the inquest of Lanagan; she was sworn, and I took her evidence in writing; she was lying in bed at the time; she appeared ill; she appeared sick at the stomach; occasioned, as I supposed at the time, from something taken into the stomach; she vomited; did not purge, to my knowledge; think she asked for drink one or more times while I was there; did not complain of a burning sensation in her throat. It was my professional opinion at the time, judged from what she told me, and not alone from appearance, that she had been poisoned. [Objected to and ruled out by the court.]

The counsel for the prosecution here offered to prove by this witness that he and Prof. Dakin made an examination of Miss Lubee's stomach after her death and found poison therein, to which the counsel for the defendant objected. The court overruled the objection, and the counsel for the defendant duly excepted.

I examined the stomach of Miss Lubee after her death, in company with Prof. Dakin; found arsenic there, and think she died of the effects of that poison; applied the same tests in her case as in the case of Lanagan. I do not know that at the time I saw her she had hopes of recovery; I told her she would

The People v. Robinson.

recover, and I thought she would at the time; I do not know that she expressed an idea about it. There then seemed to be a prevailing impression about the room that she would not recover; I approached the bed and put my hand on her pulse, and spoke a few words to her; I told her that I thought she would recover; she said that she felt very sick. I did not change my opinion about her recovery before I left, and communicated no different opinion to her from the one I first expressed to her. I held an inquest on her body on the 26th of May, in the morning about nine A. M. I made the post mortem examination of Miss Lubea before I did that of Mr. Lanagan. The arsenic that I found in the stomachs of these two persons was of the same kind I found at the house of Mrs. Robinson.

Cross-examined by Mr. Pierson.—The tests were principally conducted by Prof. Dakin. First saw Mrs. Robinson on the evening of the 25th, after nine o'clock; she was not, to my knowledge, at either of the coroner's inquests; I conversed with her in the jail; at the jail I conversed with her; she seemed much excited, and not entirely rational; she was dressed in a short gown; her person was not exposed; I took from her her key on that occasion; I went with it to the house where she had been residing; found the arsenic as before stated; found, also, under the carpet, and by the arsenic, a box of jewelry, a watch and chain; will not be positive about a locket; think there was one; the watch and chain, I think, were in the box; there were breastpins, cuffpins, earrings and articles of that description. I next saw Mrs. Robinson in jail the day following; conversed with her then; it was much the same as on the evening before) I thought she was not rational; she acted strangely and quite unnatural; her answers to questions were not satisfactory; I did not get the information I asked for; I went to ask her about her furniture; her answers were not pertinent to the questions I put to her; I staid with her on this occasion ten or fifteen minutes; there was a wild, unnatural appearance to her eyes; I can't say her motion was any way peculiar; I mean her gesticulations; she was sitting at the time.

The People v. Robinson.

Before I came away she left her chair and walked to the window; I saw her on several occasions during a fortnight after the occurrence; two or three times a week I might have visited the jail; I was always impressed with the idea that she was not rational. I told her once that I heard that Lanagan and Miss Lubees were dead; she took no notice of the remark that I could see; so far as I could judge, I think she did not know what I meant. I did on one occasion charge her with poisoning those persons; it was during the second or third week of my visits; my expression was this: "You know you have poisoned those people, and I want you to tell me about it; all about it." She made no answer to this, but went on clattering away with the same jumble that she had usually had over; I could not see that she comprehended what I meant. From the beginning to the end of my visits to the jail, I became satisfied that on all the occasions I saw her, she was not a rational woman. The jewelry, &c., found at Mrs. Robinson's house, I gave up to Dr. Hegeman.

To Mr. Hogeboom.—I should say my visits lasted some two or three weeks; may have been longer; no person employed me to visit her; I was not requested to attend her; it is possible that she may have requested me to call; I do not recollect that she ever sent for me, or requested me to come and see her; I have not been paid for those visits; I never saw her before the evening of May 25th, '53, to my knowledge; after I had relieved myself of the care of her property, my visits were discontinued; I attended her person as long as I had charge of her property. I have been called upon to see insane persons to testify in regard to insanity, but not with a view of treating them medically; I never had a person under my charge for the treatment of insanity; my residence has been in this city since I have been in practice, with the exception of one year when I was in Brazil, South America; I should say I have been called upon to inspect some twenty or thirty persons supposed to be insane; so called upon in and about this city; these persons were not charged with crime, nor were they in hospitals; it has usually occurred in private practice; and I was called upon to testify before a judge in order to get them to the

The People v. Robinson.

asylum; all of them were not cases of this description; some of the subjects were inmates of the almshouse; the examinations were for the most part single examinations; called upon them once; recall one whom I examined twice; I am thirty years of age. On the evening of the 20th of May, when I first called at the jail, and during my interview with Mrs. R., Charles Burns, Francis Bowman, Nathan H. Camp, and the officers of the prison were present; I was there about ten minutes; I told her I had come to search her person; I forget what reply she made, but she was laughing at the time; I recollect that she made replies to that remark; the reply was not touching the subject; I did search her person; she facilitated the search by standing passive, and raised her hands; she offered no resistance to my search; I made the remark that I had come to search her person when I first entered the room; she was in a distant part of the room, but what I said was audible, and as I approached her, she elevated her hands, as I have stated; I can not repeat the remark, or the substance of a remark or question that I made to her on that first interview; I considered her dressed unusually at that time; singularity of dress was not one of the elements of the judgment I formed as to the state of her mind; her eyes had an unnatural and wild appearance, and her countenance an unusual expression; when a person is fearful or terrified, the eye will sometimes assume a wild and unnatural appearance, and the countenance an unusual expression. This will be more or less the case sometimes in a person in liquor, or of the use of liquor, even before the approach of delirium tremens; insanity is sometimes simulated or feigned; I don't think I ever saw a person who feigned insanity; don't now recollect of having seen one. I read journals on insanity, periodical publications; have never made it a particular study; think I have read some works on insanity; from what I have read, I have the impression that it is laid down that it is not difficult to distinguish between real or feigned insanity; in some cases, I think it requires a close and long continued examination; I think, I will not swear with certainty on that point; think the longest interview with Mrs. Robinson at

The People v. Robinson.

the jail was as long as twenty minutes; my usual visits were as long as ten or fifteen minutes. I think Mrs. R. complained of being ill, or the jailer told me she was ill, on one or two occasions. The jailer's name I do not recollect; it was not Dr. Hegeman; I can't state at which interview I was told about Mrs. R.'s illness, only that it was not at the first; I did not prescribe for her at the time; I did not attend her for medical purposes; my visits generally were in reference to her affairs, her property; I had the keys of her house; I made up my mind at the first interview that she was not rational.

Q. Will you tell us what induced you to go two or three times a week to see a crazy woman about her property?

A. There were no inducements held out to me, sir; at the first interview, I asked her for the keys of her house; I forget whether she handed me the keys, or whether I took them from her pocket or dress; when I asked for the keys, she made no reply, but kept on talking; I think I got the keys shortly after I asked for them; there was nothing about the transaction of getting the keys from her that produced the impression in my mind that she was not rational that I now recollect; I can not tell what she did talk about at the first interview; I do not recollect her remarks, or the substance of them, at that interview; do not recollect that at this interview Mrs. R. requested that her clothes should be sent down to her from her house; I have forgotten entirely the details of the conversation at the second interview; I do not now recollect any thing she said then in substance; my remarks to her were something about her property; I think she said nothing to me about her property at the second interview; I recollect that she was talking and laughing about, but I do not recollect any observation she made, or the subject of it; I forget whether the jailer was present at this interview or not; Mr. Price, or his deputy, Dr. Hegeman, may have been there; can not state positively that any one was present; my impression is that one of those I have named was in the room or at or near the door; I was inside; I think the door was not locked; I think she did me no bodily harm; I recollect one day of having remarked to her that I had

The People v. Robinson.

heard that Lanagan and Miss Lubeé were dead; she made some observation, I think not in reference to it; I know she made no observation in reference to it; she talked about something else; it had no reference to the subject; I can't tell what she said did relate to; my remark made no change in her countenance; she did not seem shocked or startled at what I said; one day I asked her if I should give up certain articles (some utensils, a boiler and spider, and a bonnet, I believe) to Mrs. Lanagan; I told her Mrs. L. wanted those things; had been to me for them; Mrs. Robinson replied, "Why not?" I think this was the only allusion she ever made to me in regard to Lanagan or his wife; the articles were asked for, as I understood it, as Mrs. Lanagan's articles; I regarded the answer as pertinent to the subject—as rational; at some of the interviews she talked about dresses, but I do not recollect distinctly what she said about them; I don't think it irrational to talk about dresses, but the remarks about them at this time I regarded as irrational, because the remarks were disconnected with any other subject; I sent down dresses to Mrs. R. from her house: do not recollect whether this was in pursuance of a request from her; it was either herself or some person connected with the prison, who requested it, I think; don't know that I sent them down to her in consequence of the remark of hers about dresses; don't recollect that she requested dresses to be sent down; if such a request was made to me by her, I have forgotten it; I do not recollect that she put any questions to me about the jewelry; Dr. Hegeman, I believe, was my successor in the charge of her property; I gave the keys to him; no person requested me to do so, she did not; I did tell her on one occasion, "you know you have poisoned these people, and I want you to tell me all about it," and she made no reply to it; it seemed strange to me that the remark did not affect her expression or manner; it did not seem strange to me that she did not admit the charge: it was not an evidence of the absence of reason; it would not be strange in a sane person to rather evade such a question, but I should think she would say something in regard to it; I made remarks at all these interviews

The People v. Robinson.

about her property, but what they were, or the substance of them, I do not now recollect.

To Mr. Beach.—In the course of my medical practice I have often had patients temporarily delirious, &c; my practice has been tolerably extensive; I have managed to get a living by it; I have repeatedly had occasion to consult with Dr. Brinsmade; was associated with him in business some ten years; at my first interview with this lady, the expression of her eyes did not strike me as that of drunkenness, neither did her face indicate a state of drunkenness; in the course of my several interviews with her, I directed my attention to the condition of her mind; partial alienation of mind is a form of insanity; my recollection of those interviews is, that her answers to my questions were not generally responsive; at most every visit she appeared full of levity; her failure to reply directly to my questions was one of the reasons that led me to believe that she was not rational; I do not know whether she had access to stimulating drinks after her confinement in jail.

Prof. Francis E. Dakin, of Albany, sworn.—By profession, I am a chemist; I have been for several years in the habit of analyzing various substances; I conducted the analysis of the contents of the stomach of Mr. Lanagan and Miss Lube, in connection with Dr. Bontecou, at his house; we discovered arsenic in both the stomachs; we applied five or six different tests; each resulted in showing the presence of arsenic; I have no doubt of the presence of arsenic; we found the arsenic and the compositions we obtained from the stomach are before you in the jar; we found arsenic in considerable quantities, I should judge to produce death; I am not a physician; we analyzed the sugar also; found no arsenic in that; Dr. Bontecou's family used the sugar afterwards; we analyzed the forty grains of arsenic taken from the stomach, and I took the mucous found in the stomach of Miss Lube, and found arsenic in that; the contents of the paper found at Mrs. Robinson's residence we also analyzed, and found it to be arsenic.

The prosecution here rested and the following evidence was given by the defence:

The People v. Robinson.

William H. Hegeman, sworn.—Am a practicing physician; have been jailor for a year and a half, and two years have practiced as a physician; was jailor at the time this woman was arrested; had never seen her to know her previous to that time; during her confinement in jail, I have seen her usually three times a day, except on days when I have been away; I lodge at the jail; saw her on the 25th of May, going up the stairs of the jail, and once in the room, but had no conversation with her; did not examine her appearance on that evening; do not remember now that I heard any conversation between her and others on that evening; saw her on the next morning; could not say who was present; think the sheriff was present; I spoke to her; her appearance was strange, singular; her dress was much disordered; her eyes seemed to have an unnatural appearance; her countenance seemed to me to be expressionless; she didn't seem to realize her condition; had no conversation with her to any extent at that time; she came in on the evening of the 25th May, 1853; I believe she staid the first night in the first room she entered — the room usually occupied by women; on the morning of the 26th saw her and asked her if she would not like to have another room; she was then put up stairs in the room she now occupies; her remarks, whenever she did make any, were disconnected; she seemed irritable and sullen; when she was on her feet, her movements were very quick and very impulsive; she so continued, at least, when I saw her; I do not remember how she passed the night of the 26th, but on the evening of the 27th I watched at her door; the reason of my doing so was that she seemed to be raving, calling for assistance to protect her, and passing violently from one end of the room to the other; this continued all night; at nearly daylight I left the room and went down stairs; her door was usually locked between eight and nine o'clock in the evening; the first week or two I could draw but little conversation from her; I think I spoke to her at the time of the funeral of the deceased; told her I supposed the funeral ceremonies were about this time being performed; she looked a little sober at this, and said, "it is queer, isn't it?" and com-

The People v. Robinson.

menced talking and laughing on some other subject; this was all she said on the subject of the funeral; I endeavored to satisfy my own mind what the condition of hers was; I thought her of unsound mind; I have discovered great reluctance upon her part to be thought insane; since she has been in the jail she has destroyed part of her furniture; of six sofa-bottomed chairs, she has destroyed five; she had a table which she partly destroyed; she has destroyed dishes, and a silver cake basket; she has complained of ill health a good deal since she has been there; I could not say what the state of her health was when she first came to the jail; for the first three or four months she was in the jail, she had no intoxicating drinks; last fall she had some as a medicine; I directed it; it was in July or August that it was supposed that she would die; I was absent at the time; was not physician to the jail, and was not the person called; got home before she recovered; Dr. Adams was physician of the jail at that time; I did not know from an examination of her condition what had been the matter with her

Cross-examined by Mr. Hogeboom.—Am twenty-six years of age; I graduated between three and four years ago; practiced medicine about one year; graduated in the city of New York, at the University Medical College, Broadway; practiced medicine one year, aside from two years I have been physician to the jail; practiced in Troy; became deputy sheriff about three months after my first year expired as physician to the jail; I was physician to the jail at two different times; the first time from the fall of 1851, till the fall of 1852; the next January I was appointed deputy sheriff and the next September or October I was appointed physician to the jail again; could not say positively at what hour on the morning of the 26th of May I saw Mrs. Robinson. It was perhaps between nine and ten o'clock; her dress was disordered, it was hanging loose on her, was dirty, as though long worn without being washed. It was a slate colored morning dress; the one she came to the jail in; she had no other there then; I procured some thing for her from her house; her trunk was sent to the jail before;

The People v. Robinson.

she dressed better after this, when she dressed at all; never saw her without a dress; have seen her in her night dress all day.

At the time I speak of her eyes had a wild appearance; it seemed impossible to catch her eye; this is not so much the case now; should not think this a sure mark of insanity; some persons differ in the appearance of the eye; some have that wild appearance of the eye more than others; I think she is of unsound mind yet; but not to so great an extent as formerly; think she has been partially of unsound mind ever since she has been in the jail; more so at some times than at others; by partially of unsound mind, I mean that it was more apparent to me at one time than at another; I think the appearance of unsoundness is not so extensive to-day as I have seen it; not so readily observed; can't say why not so readily observed, unless because she is or seems more cautious; her countenance is not now so expressionless as it was when I saw her on the 26th of May. On that day her eye was wild; but I could not gather from the expression of her countenance as to what she wanted; I had no considerable conversation with her; when asked if she would like another room, I am not certain that she made any reply; if she did make a reply, it was neither of assent or dissent; I know this because I thought it strange that she gave me no answer; I know that I asked her the question; whether she answered or not I don't know. To the question: do you possess that degree of medical knowledge and skill that would justify you in passing an authoritative opinion on a person's sanity, witness answered, perhaps not. In my private medical practice, never had but one case of insanity. I was the attending physician in that case.

We have had three or four cases in jail; the case of one man was brought in from the country; those who brought him there said they could not well take care of him, and wished to have him kept there. The cases I speak of were not desperate cases of insanity; irritability and sullenness do not always attend insanity; don't think sitting still on a chair, when a person is seated, is remarkable; the night of the 27th, when I watched at her door, I was apprehensive she might destroy herself;

The People v. Robinson.

think I was not told to watch; she seemed to be raving; called on the watch and police to protect her; could not hear all she said, and do remember only the words watch and police, and saying she should be killed; at this time she hadn't been supplied with any liquor, to my knowledge; do not know that opium was sent for, for her; don't know that she requested it; don't think she had any; I do not know that during her stay in jail she has been supplied with any other stimulants than liquor and snuff. It was two or three days after she was committed that I spoke to her about the funeral; don't think I mentioned to her, in speaking of the funerals, the names of deceased persons; think I said the funeral of the man and woman supposed to have been poisoned, is taking place now. The answer she made was "it is queer, isn't it?" and commenced talking about some articles of her dress; I arrived at the conclusion that she is reluctant to be thought insane, recently. I did not at any time communicate to her that if on the trial she was found insane, she would not be discharged but would be sent to an asylum; a few persons have seen her in the jail; I think it was at the Oyer and Terminer, in February, that I first thought she didn't like to be thought insane; she told me so; she said she was not insane now, that was the time we had conversation; she didn't tell me when she stopped being insane.

It was last winter some time that she broke up the chairs; she broke up five out of six; she had a rocking chair of her own; that she didn't break; this was after she had been indicted; she had been brought into court to answer to the indictment; she broke the chairs in pieces and burned them up; I think she was mad at somebody; don't know she said so in words; she had no particular difficulty at that time with any one; she was of violent temper; there were other things in the room which she didn't destroy; three tables, a wash stand, a looking glass, wardrobe, bed, &c.; some of the dishes were hers; others were not; she tried to melt the silver cake basket; I asked her why she destroyed them; she said they were hers, and she would do with them what she pleased; I did not pie

The People v. Robinson.

scribe ardent spirits daily; supplied her with brandy part of the time; sometimes wine; mostly brandy. When she complained of being unwell I prescribed spirits for her; don't think I carried ardent spirits up to her more than six or seven times; do not know whether Dr. Adams prescribed brandy too; her complaint was diarrhea, headache, sleepless nights; she asked me for brandy; this was a month or two before I began to be physician to the jail; she asked me for brandy before, and I refused; she never asked me for beer; occasionally got snuff for her.

To Mr. Olin.—Do not know any thing of this woman's husband.

To Mr. Hogeboom.—The liquor that I ordered was the only liquor or wines sent to her room that I remember of; the sheriff sometimes has the key; the man who assists us also has access to the key of her room; know of no little indulgences she had in that way; Dr. Adams might have left her a few pills of opium; remember of prescribing none; have prescribed Dover's powders for her occasionally; opium in any other form I have never prescribed for her.

Mary J. Dillon sworn; reside in Troy, in the upper part of the city; I know Mrs. Robinson; I resided but a short distance from where she did; saw her frequently before she was put in jail; my business was dress making; some time in March, 1853, she came in and asked me if I did plain sewing; I told her I did; she had a dress she wanted me to fix; I told her that I had so much sewing in the house that I didn't see how I could do it right away; she said she wanted it done so bad, she would pay me any price to fix it for her; she then told me it was too short in the waist; she had the dress with her; I told her I didn't think I could make it any longer in the waist; she then told me to let the waist go as it was and to fix the other part; don't recollect who she said cut the dress; I believe she told me first that she cut it herself, and afterwards that a dress-maker cut it; she said that Oliver Boutwell himself and his family had slandered her; she told me her name was Mrs. Robinson; she told me she was a lord's daughter in

The People v. Robinson.

Ireland; that she was turned away from her father's castle for marrying a poor man; she then cried; soon afterwards something seemed to pass her mind, and she laughed, and danced about the floor, and began to tell something; I don't recollect what it was.

At another interview, quite a spell afterwards, she showed me a daguerreotype, representing a lady with a bundle of flowers; she said it was the daguerreotype of her mother; she said the flowers were gathered in the garden of the king of France; she said her mother gave her this likeness when her father turned her away; she told me another time her mother died when she was a small child; another cause of her being turned away was her stepmother. This was at the time she told me her mother died when she was a small child; it was at another time she told me her husband was a lord in Ireland; she told me one time she was educated in a nunnery; at another time she told me she was educated in Mrs. Willard's Seminary; she told me at one time, after her father had sent her away, he sent for her to come back, that he would forgive her; she said, at one time, her father had sent her \$150 dollars to purchase a single dress to appear in court against Oliver Boutwell for slander; she said she could jump into the river and swim until she got tired, and then she had a cork which she could put between her teeth, and rest in the water and not sink.

I was on the bank of the river with her, near her house, which was near the bank of the river; before she went on the bank of the river, she saw a boat coming down; she said that Oliver Boutwell had stopped the navigation, and the boat could'nt pass; while on the bank of the river, she began to hoot at the hands on the boat, but they did not hear her; she had a revolver in her hand, and began to climb up the rocks; she got about half way up, and turned to me and said, "Mary Jane, would'nt I make a good soldier?" She said she was sick at one time, sent for Dr. Buswell, he came and left her a bottle of medicine; she said she suspected the medicine was poison; said she went to a neighbor and got a dog and gave the dog some of the medicine; said the dog died within half

The People v. Robinson.

an hour; she then said she put the cork in the bottle and threw it into the river; that some one found it and brought it back to her; she said she paid \$5 for the dog; was frequently at our house; recollect of her coming there one time without any dress on; it was about a month before she was put in prison; it was about half past four or five o'clock in the morning; she had a night dress on, and a white sun-bonnet; had on no shawl; only my brother was up at the time; she wanted me to lend her a dress; she said she wanted to go down street to purchase a revolver, and take out a warrant for Dave Smith; I let her have my clothes; she went off with them; that same day I sent my sister for the dress; recollect of her coming to our house on another occasion about eleven or twelve o'clock in the night, in March or April. The family were in bed; she woke us up; she wanted my sister to go after Dr. Buswell; that her husband had just come home then, and was very sick; she told my sister if she would go she would give her a revolver to take with her and pay her a sum of money, the amount of which I don't recollect; my sister told her she didn't want to go; Mrs. Robinson then said that she didn't want Dr. Buswell for her husband; her husband was not sick, but she wanted to get him to blow his brains out, as he was at her house the night before and insulted her; I once told Mrs. Robinson to go home, that I did not want her there; she said she would not go; this was about three days before she was put in jail; she said she would let me know what authority she had there; I told her again to go, to go out of the house; I said no more on that subject afterwards; she went shortly afterwards; three days after she came in and said she had a warrant for me; that I had slandered her; asked her what I had said about her; she made no reply; came up and kissed me and asked me to forgive her.

Cross-examined by Mr. Van Santvoord.—Live on the corner of North First and Rensselaer streets; about four times as far as across the court room from where Mrs. Robinson lived; I was then living with my father; I have one older sister, who is not at home; I was the oldest of the family at that time;

The People v. Robinson.

my father is a gardener; he was generally about during day times; I was seventeen years of age the 3d day of last April; my next oldest sister now present was fourteen the 4th of April last; I was not acquainted with Mrs. Robinson until she came to have the dress altered; had seen her before; saw her going into Mrs. Lanagan's; it was March or April; one year ago last March when she came; I fixed the dress for her; she first told me that she cut the dress at first, and then afterwards that a dress maker cut it; I thought it singular at the time that she should tell me two different stories; I do not remember whether I said any thing or not when she told me Mr. Boutwell had slandered her; at this first interview said she went into Mr. Galvin's one day; that there was a man in there who insulted her; she said he was going to lay violent hands upon her; that she drew a revolver and bid him stand; I recollect nothing further of this conversation; after that we became quite intimate; she frightened me; she took hold of me the same as she said she did hold of the man, but she laughed and seemed so pleasant about it that I thought little of it afterwards; when she saw I was frightened she laughed; I was not frightened by her much afterwards. I have seen ladies in liquor; can't say how many; as many as two or three; can't say that Mrs. Robinson was in liquor at this time. I never knew Mrs. R. to drink any thing stronger than peppermint cordial; at any of these interviews I could not say she had or had not been drinking liquor; I think it was after the first conversation, and when she showed me the daguerreotype, that she told me about her father being an Irish lord.

Anthony Goodspeed sworn.—I reside in Troy; am a butcher in the Centre Market with Mr. Fonda; should know Mrs. Robinson if I should see her (she uncovered her face); that is the woman; she came to the market the last day of March, 1853, in the afternoon; she wanted to buy some game; she asked me if we had any game, and I told her we hadn't any, that the season of game was about over; she conversed principally about game; she wanted to get some wild meat; I told

The People v. Robinson.

her we hadn't got any; she asked me those questions for game about a dozen times; she was there in the neighborhood of fifteen minutes, I should suppose; while there she was laughing, turning round on her heels, and would "ha! ha!" a number of times; she started to go out of the door, and come back, when she said she had been down to Robertson's office to take out a half dozen summonses and warrants to get her neighbors to the court next morning, and to make an April fool of them; she made a number of gestures, &c.; she stepped to the stairs, and asked me would I not tie her gaiter up; I did so; she turned around then and went towards the door, when I asked her who she was? and she told me Mrs. Robinson; I think I have stated all she did; she said there had been people abusing her at the dam.

Cross-examined by Mr. Hogeboom.—Should think she was not in liquor; her gaiter was loose; she did not tell me who was abusing her; didn't give me any names; don't know any thing about any person being discharged; think it was the state dam referred to; could not say who had charge of the state dam.

Mary Jane Dillon, cross-examined on the part of the prosecution by Mr. Van Santvoord.—I can tell at what interview Mrs. R. said her father was an Irish lord; it was the same interview that she showed me the daguerreotype; the daguerreotype I saw at the first interview; this was the same interview at which she told me her father was an Irish lord; the second interview took place the next day after she came to have the dress fixed; the second time she brought me more sewing; had a long conversation this time; talked about a great variety of subjects, but don't recollect what they were; don't recollect that I told her much about our family; she appeared a pleasant lady to talk with, and I was rather pleased with her conversation; her manners were agreeable to me; I am sure she said an Irish lord; my father is an Irishman; I was born in Vermont; it was before that she told me her father was an Irish lord, and she had been turned away from the castle for marrying a poor man, that she showed me the daguerreo-

type; the miniature showed a lady of about thirty years of age; she did not tell when her mother was in France; don't think I believed this story — can't be positive; when she talked about her mother's death she cried violently; believe she cried when she showed me the miniature; she continued crying but a short time; don't recollect what I said to her; she soon commenced conversing about some other subject, and then she commenced laughing; don't recollect what that subject was; I think I laughed too; immediately she commenced dancing, and danced but a short time; I think the subject she talked on was rather amusing; I don't think it was about balls or parties; I did not dance; my sister was not present; I do not think any other person besides myself and Mrs Robinson was present; her dancing was not regular; she jumped around; it was a figure I never saw danced before; she offered to show me no steps of dancing, or anything of the kind; I think I laughed at the performance; we parted good friends; I think it was at the same interview that she told me her father was a French lord; I don't remember what I said when she told me that; didn't say who the "poor man" was that she married; Mrs. Robinson told me at one time that she was twenty-seven years of age; don't remember at what time she came for her dresses; I think I took them home; this, I think was the first time I was ever in Mrs. Robinson's house; don't remember how long I remained; think I staid there two hours and a half; was in conversation with Mrs. Robinson all that time; the reason I staid so long was that she did not want to have me go; I wanted to go; she did not detain me by force, but by persuasion; I think she told me stories then which I did not believe to be true, but I do not remember them; I think she told the story about being in Mr. Galvin's at that time; her conversation was as pleasant and agreeable as on former occasions, part of the time; part of it was not; every now and then her conversation was not so agreeable; think it was coarse; she used profane language; when I left she asked me to come and see her again; think I told her I would; no person to my knowledge, lived in the house with her at that time; I did go to

The People v. Robinson.

see her again; I think it was the next day; she had been to our house before I repeated my visit the second time; our interview at our house was very short; she came over for me to go back with her; I went with her; I staid there all that day; it was somewhere between the hours of eight and ten in the morning that I went; I took dinner with her; did not take tea; think I began to feel on intimate terms with Mrs. R.; this familiarity of intercourse continued for about two weeks afterwards; I visited frequently at her house, and she at ours; almost every day I saw her, but was not at her house every day; there were about four days she was not at our house, and I didn't go to hers; I had a very pleasant visit at her house the day I spent there; it was pleasant, part of the time; her conversation was pleasant, part of the time; there was something in her conversation that made it unpleasant another part of the time; don't remember what it was; it consisted in a peculiarity of language; such language as ladies don't use; it was profane language; she used obscene words; at this time or some other, I think she said something about the man she had married; she said her husband was a contractor on the rail road; his name was Mr. Robinson; do not recollect at which conversation it was she told me she was educated at Mrs. Willard's Seminary; think she told me at one time what her maiden name was, but I do not recollect what she said it was; when she said she was educated at a nunnery, she did not tell me where it was; never heard Mrs. Robinson speak French to any person; she told me she could speak French; Mr. Lanagan's family were Mrs. Robinson's associates; Marietta Curtiss and my sister also associated with Mrs. Robinson; another sister older than the one here yesterday, and older than I; Marietta Curtiss lived a short distance from my father's house; she is a friend of mine; don't know that she ever went to Mrs. Robinson's; Mrs. Robinson used to go to her house; know of her going there only once; I have seen Mrs. Robinson drink strong beer and peppermint cordial; don't know which may be the strongest; have frequently seen her drink strong beer; she drank some at her own house on the day I spent there, I think; won't be posi-

The People v. Robinson.

tive; I did, during these interviews, see her on occasions when I thought she was a little worse for strong beer or peppermint cordial; don't recollect that I thought so on the night she came to our house, for my sister to go after Dr. Buswell; I thought she seemed strange that night; I know Dr. Buswell; know Mr. Boutwell by sight; he lives on River street, next opposite to Mrs. Robinson's; I don't know that Mr. Buswell has a dam; know he has a mill; know there is a dam in the river a short distance above Mrs. R.'s house; the mill is on the bank of the river, I think a quarter of a mile from the dam; it is between the dam and Mrs. Robinson's house; it was about a week after that I became acquainted with her that she told me about Boutwell's stopping the navigation; I was standing then on the bank of the river with Mrs. R.; between Mrs. R.'s house and the river, and running down to it is a vacant lot; there is a door leading from Mrs. R.'s yard to this vacant lot; on the bank of the river are some rocks; we went to the bank of the river, because Mrs. R. saw a boat from her window coming down; she said Mr. Boutwell had stopped the navigation, and she didn't believe the boat could pass; Mrs. R. had been observing this boat from her window; the boat was below the dam, coming down the river; it was not a sail; when we first saw the boat I could see it was coming down the river; saw it from Mrs. Robinson's window; she said she didn't believe the boat could pass Mr. Boutwell's mill; I had never heard of Mr. Boutwell's stopping the navigation before Mrs. R. said so; I don't think she told me the story of poisoning the dog with Dr. Buswell's medicine at this time; it might have been the same time or afterwards that she told me about her father sending her \$150 to buy a dress to appear in court against Boutwell; it was at this time on the bank of the river that she told me about her swimming; do not know that Mrs. R. can swim; had seen her drink no beer or peppermint cordial that day, that I remember of; it was some weeks after I became acquainted with her that she came to my house with no dress on, think it was in March or April, between four and five o'clock in the morning; do not remember whether it was light; she put the

The People v. Robinson.

dress on at our house; think it was daylight when she put it on; she told me she had forgot her dress and didn't want to go back after it; I don't think I heard her speak of David Smith before; she said she was going to get a warrant for David for breaking into her house and stealing her revolver; said nothing about the difficulty she had with him at Lanagan's that time; it was a mousseline de laine dress I let her have; it was neither my best nor poorest dress; it was not my ordinary dress; it was such an one as I sometimes walk in; I received the dress uninjured; when Mrs. R. said it was not her husband she wanted Dr. Buswell to see, but that she wanted Dr. B. to come up there that she might shoot him, she appeared very angry; used very profane language on that occasion; called him bad names; I don't wish to say what the names were; she used obscene language concerning him; I never saw Dr. B. at Mrs. R.'s house; I do not wish to repeat the language she used relating to Buswell, because it was both profane and obscene language; I don't think I kept up my familiarity with her long after this time; I could not tell how long before her arrest it was that we ceased to associate together; I told her once to go home; this was after she came to our house at eleven o'clock at night; the next time she came she said she had come with a warrant for me; that I had been talking about her; there was no quarrel; there was a little dispute; we made it all up again before we parted, and she kissed me; I don't think I ever went to her house after this time; at my various visits to Mrs. R.'s house, I saw Mrs. Lanagan's sister there, who just came to the door and returned again; my father came in there; he was at work in the garden; saw a man there one day; don't know who it was; had a slight glimpse at his face; he was a middle aged man; she told me at one time it was her husband; she told me again that it was another person.

To Mr. Pierson.—When Mrs. R. told me that her father was an Irish lord, I don't recollect that I thought she was in liquor.

Further evidence of the singular conduct of the prisoner was

The People v. Robinson.

introduced for the purpose of supporting her defence of insanity.

Mr. Beach asked the court how it would rule in regard to the use of medical works touching insanity; if citations from those works should form part of the argument?

The court said such was the usual course.

Mr. Beach stated that the evidence for the defence had now closed.

Some testimony was then introduced on the part of the prosecution for the purpose of explaining her conduct, by showing that the prisoner had sometimes been "the worse for liquor."

The testimony was here closed.

In the course of his charge to the jury the presiding judge said: It is my duty to say to you, gentlemen, that, if she was intoxicated, even to such an extent that she was unconscious of what she was doing, still the law holds her responsible for her act. It is true to constitute the crime of murder there must be killing of a human being with a premeditated design to effect death. But this design need not be proved. Where the act is committed the law imputes the design. It proceeds upon the simple principle that a man may reasonably be presumed to intend to do what he in fact does. Thus, if a man will draw from his pocket a pistol and deliberately shoot down his fellow man, the law, without further proof, adjudges that it was in his heart to kill him. If he would excuse himself he must show affirmatively that he had no such guilty purpose. Then, and then only, can he be exonerated from guilt. If it appear that by the inscrutable visitation of Providence the faculties of his mind had become so disordered that he was no longer capable of discriminating between right and wrong in respect to the act he has committed, then the law, in its justice, pronounces him innocent of crime. But if his derangement be voluntary — if his madness be self-invited — the law will not hear him when he makes his intoxication his plea to excuse him from punishment.

The People v. Robinson.

If, then, the accused mingled poison in the beer that was drank by Lanagan, the law charges her with a design to kill him — and though she may have been excited by drink at the time, even to such an extent as not to know what she was doing, she must answer for the consequences. Her self-inflicted insanity must not be allowed to avail her for her defence. The law still imputes to her a murderous intent. (a)

The counsel for the prisoner duly excepted to that part of the charge of the said justice contained in the following words, to wit:

“It is my duty to say to you, gentlemen, that if she was intoxicated to such an extent that she was unconscious of what she was doing still the law holds her responsible for her act.”

And also to that part thereof wherein the said justice instructed the jury that “though the prisoner may have been excited by drink at the time of the alleged offence, even to such an extent as not to know what she was doing, she must answer for the consequences; her self-inflicted insanity must not be allowed to avail her for her defence. The law still imputes to her a murderous intent.”

The jury found the prisoner guilty of murder.

The counsel for the prisoner thereupon presented and read in evidence to said court the following affidavit and certificate:

Rensselaer Oyer and Terminer:

Henrietta Robinson	}	<i>Rensselaer County, ss:</i>
ads.		
The People.		

John Price, of the city of Troy, in said county, being duly sworn upon his oath says, that he was duly elected sheriff of said county at the general election in November, 1852; that on the first day of January, 1853, he was duly qualified as such sheriff and that since that time he acted and still acts as such sheriff. That a court of Oyer and Terminer and jail delivery was appointed to be held in and for said county and was

(a) This charge is reported at length in 1 Park. Cr. R., 649.

The People v. Robinson.

held at the Court House in the city of Troy in and for said county on the third Monday of February, 1854.

And this deponent further says, that from and after the first day of January, 1854, Anson Bingham was the district attorney of said county and has acted and still acts as such district attorney since the date last aforesaid.

And this deponent further says that the said district attorney did not, twenty days before the holding of the said last mentioned court, nor at any time before the commencement thereof, issue or deliver to this deponent as such sheriff, nor did he issue or deliver to the sheriff of said county, such precept as is required by title 4, chap. 1, part 3, sections 37, 38 and 39 of the 2d volume of the Revised Statutes; nor did he issue or deliver to the said sheriff any such precept as is required by the said Revised Statutes.

And this deponent further says he is informed and believes that an indictment for willful murder was preferred and found against the above named defendant at the said last mentioned Oyer and Terminer, on which she was tried during the past week and has been found guilty of such murder. And this deponent further says that no precept whatever was ever issued to him by or on behalf of the said district attorney or by or on behalf of any district attorney whatever directing him to summon any grand or petit jurors to act as such at said Court of Oyer and Terminer so held in and for said county of Rensselaer, in the month of February, 1854, as aforesaid.

JOHN PRICE.

Sworn this 29th day of June, 1854, before me,

WM. H. HEGEMAN, Com. of Deeds, Troy, N. Y.

Rensselaer Oyer and Terminer:

The People	}	<i>Rensselaer County, ss:</i>
vs.		
Henrietta Robinson.		

John Price, of the city of Troy, in said county, being duly sworn, says, that previous to and within twenty days of the commencement of the last February Oyer and Terminer for the

The People v. Robinson.

said county, he, this deponent, communicated to Job Pierson, Esq., then and since counsel for the prisoner in this case: That the district attorney for said county had not issued and delivered to him any precept as this deponent has heretofore deposed in his affidavit heretofore made in this case, and also within the same time all the facts in relation to a want of said precept, heretofore stated in his former affidavit before she was arraigned upon the said indictment.

And he further says that as the said sheriff he caused to be published a proclamation, within two or three days of the usual time, in accordance with the requirements of the Revised Statutes referred to in his former affidavit in the same manner and for the same length of time, except the two or three days aforesaid, as though such precept had been issued and delivered to him.

JOHN PRICE.

Sworn to before me this 28th day of August, 1854.

WM. H. HEGEMAN, Com. of Deeds, Troy, N. Y.

Rensselaer county, ss:

I, Ambrose H. Sheldon, clerk of Rensselaer county, do certify that no such precept as is mentioned in the foregoing affidavit has ever been returned to or filed with me as such clerk as aforesaid; and that no precept whatever, issued by any district attorney whatever, requiring the sheriff of Rensselaer county to summon grand or petit jurors at the February Court of Oyer and Terminer for Rensselaer county for 1854 has ever been returned to or filed with this deponent as such clerk as aforesaid.

In witness whereof I have hereunto set my hand and affixed my seal of office this 29th day of May, 1854.

A. H. SHELDON, Clerk of Rens. Co

Judgment was suspended and a writ of certiorari allowed, by which the cause was brought up for review to this court.

Job Pierson, for the prisoner.

I. The judge erred in charging the jury "that if the prisoner was intoxicated even to such an extent that she was uncon-

The People v. Robinson.

scious of what she was doing, still the law holds her responsible for the act," because if she were so unconscious, no matter from what cause such unconsciousness arose, the killing can not be said to have been perpetrated from a *premeditated* design to effect the death of the person killed. (2 R. S. 3d ed. 746, § 5.)

II. The judge erred in charging the jury that "though the prisoner may have been excited by drink at the time of the alleged offence, even to such an extent as not to know what she was doing, she must answer for the consequences; her self-inflicted insanity must not be allowed to avail her for her defence. The law still imputes to her a murderous intent." (1 *Russell on Crimes*, 8; *Barb. Criminal Law*, 268; *Pennsylvania v. McCall*, *Addison's Rep.* 257; *Penn. Comm. v. Dunlap*, *Lewis' Crim. Law*, 394-405; *Bliss v. Conn. and Pass. River Railroad Co.* 24 *Vermont Rep.* 424; *Dean's Medical Jurisprudence*, 587; *Ray's Medical Jurisprudence*, § 329, 330, 331, 332; 3 *Am. Jurist*, 15; *People v. Clark*, 3 *Selden*, 392; 11 *Humph. R.* 154; 4 *Humph.* 136; 9 *id.* 663; 1 *Leigh.* 612.)

III. The omission of the district attorney to issue a precept to the sheriff of Rensselaer county twenty days before the oyer was held, requiring him to summon the grand jury, who were drawn, was an omission fatal to the conviction in this case. (2 R. S. 3d ed. p. 271, 272, § 43, 44, 45.)

1. This precept is recognized as a process. (2 R. S. *same ed.* 535, 536, § 93-95.)

2. It is necessary at common law, and is still held necessary, except where it is abolished by statute. (1 *Chitty's Criminal Law*, 505; *Chase v. State*, 1 *Spencer*, 218.)

3. It has been adjudged that the precept must be issued to summon a petit jury, and without such precept, judgment will be arrested. It is difficult to conceive why the omission to issue such process for a grand jury, who find an indictment, is not equally fatal to the conviction. (*The People v. McKay*, 18 *John. R.* 212; *Nicholas v. State*, 2 *Southard*, 539; *The State v. Williams*, 1 *Richardson*, 188; 1 *Spencer*, 218, *above*; 2 *Speers*, 211.)

The People v. Robinson.

4. The Revised Statutes are substantially like the statutes in force at the trial of McKay, so far as they affect this question. (2 *Rev. Laws*, 503, § 13, 24 to 30; 1 *id.* 328, § 11, 19; 2 *R. S.* 271, 3d ed. § 43, 44.)

5. It is true the Revised Statutes have abolished the venire process in Courts of Sessions, (2 *R. S.* 3d ed. 810, § 25,) and in civil cases, (*R. S.* 3d ed. 507, § 9,) but the fact that the process is not abolished in courts of Oyer and Terminer, manifests the intention of the legislature to maintain it in full force in regard to the latter courts.

6. In affirmative statutes, such parts of the prior as may be incorporated in the subsequent statute, or are consistent with it, must be considered in force. (3 *Howard U. S. C.* 636.)

7. Every clause and word of a statute shall be presumed to have been intended to have some force. (22 *Pick.* 571.)

If they *may* stand together they *shall*. (4 *Gill and Johnson*, 1; 4 *Black.* 148.)

H. Hogeboom, for the people.

I. A *new trial* can not be granted on account of any evidence of the want of a *precept* from the district attorney, to summon a grand jury. The case or bill of exceptions for a new trial only brings up the evidence and proceedings *at the trial*. Besides, no objection or exception was taken on this ground.

II. The motion in arrest of judgment, or for a reversal on error, for lack of the *precept*, must fail, unless the precept was necessarily a part of the judgment record. The error, if any, must appear upon the *face* of the *record*. (*Arch. Cr. Pl.* 178, 31, 6th ed.)

III. Such precept was not necessarily or properly a part of the record. The statute required no return. It was for the information and direction of the sheriff. (2 *R. S.* 206, 207, § 37-39.)

IV. To sustain defendant's position with any degree of even *plausibility*, they are bound to show that the precept was a *venire*. Unless it be a *venire*, it was clearly not a necessary part of the record.

The People v. Robinson.

V. The precept was clearly not a *venire*, for the following among other reasons:

1. The statute does not call it such, nor invest it with the form, qualities or functions of one.

The *venire* is a common law process directed to the *sheriff*, (or coroner) commanding the summoning of a specified number of persons, (usually twelve) of certain qualifications, to make a jury in a specified cause, to determine the matters in issue therein. Each case had a separate *venire*. It was to be *returned* to the county clerk, and become a matter of record. The selection of the jurors was left to the sheriff. (3 *Bl. Com.* 352; 1 *Burr. Pr.* 227, 228.)

The inconvenience of this introduced the present mode of drawing juries by particular officers, from a list previously selected and returned by others, to make trial juries in all the cases for a particular court. The list thus drawn is *certified* and delivered to the sheriff and constitutes his authority to summon the individuals named, and upon this list he makes his return. (1 *R. L.* 328, § 11.) The *venire* was at that time retained as a matter of form, though its office was spent. (1 *R. L.* 326-7, § 7, 9; *see also* 2 *R. S.* 721, 722, 733.) But now, except in justices' courts and certain special proceedings, the *venire* is no longer in use, and is expressly abolished. (2 *R. S.* 410.)

The case of a *foreign* jury is not an exception. For, though a *venire* is issued (*Yates' Pl.* 64; 1 *Humphrey's Prac.* 236) to the foreign sheriff, his duty is to notify the clerk who draws the jury as in ordinary cases, makes and certifies a list of the drawing, and delivers it to the sheriff, who then summons the jurors not upon the *venire*, but upon the clerk's list. (2 *R. S.* 410, § 10, 11, 733.)

2. So also was the practice under the Revised Laws of 1813. They provided for a *precept* (1 *R. L.* 340, § 16) to be issued immediately upon the *appointment* of a *circuit court*. Yet it was not a *venire*, for the drawing of jurors by the clerk and summoning of them by the sheriff upon the clerk's list were provided for, much as in the Revised Statutes, and (as expressed

The People v. Robinson.

in the section) "without any *venire* previously issued," (1 R. L. 328, § 11,) or application from the sheriff for that purpose.

3. The *precept* was to be issued immediately after the *appointment* of every circuit, and *fifteen days before* the circuit. The *venire* need not be issued *before* the court, and in such cases should not be.

4. The providing of another process, (the jury list) on which the sheriff was to summon and make *return*, evinces the legislative intent, that the *precept* was not intended to be either in *form* or substance the *venire*. (2 R. S. 414, § 29, 30, *as to petit jurors*; 2 R. S. 721-2, § 11, 12, *as to grand jurors*.)

5. The *precept* is not *alluded* to, either in the Revised Laws or Revised Statutes, in the article relative to the summoning of jurors.

6. The obvious intent and office of the *precept* was to notify the sheriff of his duties, and to enable him to make public *proclamation* of the courts.

7. The case of *The People v. McKay*, (18 Johns. 212,) does not decide this case.

(1.) That related to a *petit* jury and not to a *grand* jury.

(2.) That case was decided under the Revised Laws, by which a *venire* was still necessary. The *venire* was a matter of *record*, and its absence was a defect apparent on the *record*, and that *venire* having no *seal* was *nugatory*. But that *venire* was a different process from the *precept*. (See 1 R. L. 340, § 16, *as to precept*; 1 R. L. 326-7, § 7 and 9, *as to venire*.)

8. The case of *The People v. McGuire*, decided in the fifth district, should not control this case.

(1.) That case related to a *petit* jury and not to a *grand* jury.

(2.) That case was decided *erroneously*, and without due consideration.

(a.) It based the decision on the case of *The People v. McKay*, which was a case of the want of a *venire* and not of a *precept*.

(b.) It confounded the palpable distinction between a *venire* and a *precept*, which has been already pointed out.

The People v. Robinson.

(c.) It loses sight of *other* differences between the precept and the venire. (e. g.) It is the *return* on the *clerk's list*, which governs the court in imposing penalties on nonattending jurors. (2 R. S. 415, § 32.)

(d.) Again trial jurors are not summoned for the *Oyer and Terminer* but only for the *Circuit*; and the Circuit jurors are declared to be jurors for the Oyer and Terminer. Now the district attorney's *precept*, if it is to be regarded as a *venire*, would command the summoning of jurors for the Oyer and Terminer and for that alone, and this is contrary to the statute just referred to. (See 2 R. S. 733, § 2.)

(e.) The court in *The People v. McGuire*, expressly refuse to decide the question as applicable to a *grand jury*.

(f.) The objection of the want of a *precept* is in the nature of a *challenge to the array*, and this challenge (to a grand jury) is abolished by statute, and with it must fall the incidents and elements of this species of challenge. Indeed objections to grand jurors are expressly limited to those stated in the statute, and this is not among them. (2 R. S. 724, § 27, 28.)

9. The omission to name the courts of Oyer and Terminer and Sessions in the statute, (2 R. S. 410, § 9,) which dispenses with the *venire*, was not because it was designed to retain venires for those courts, but because no trial jurors were to be summoned for those courts. They were to be taken from the Circuit and County Court juries. (2 R. S. 733, § 2.)

10. The omission to require a *precept* for Courts of Sessions, affords no inference that it was designed to have the precept operate as a *venire* in the courts of Oyer and Terminer, but the contrary.

Again, by 2 R. Laws, 150, sec. 4, in Courts of Sessions, the sheriff summoned a grand jury only by the direction of the justices of that court. Now being obtained in a different way, that provision was abolished, and a *precept* was unnecessary. Hence its abolition by 2 R. S. 724; See *Notes of Revisers*, (3 R. S. 2d ed. 843.)

VI. The statute as to the precept, no doubt, was merely *directory*. It was not *necessary* for the sheriff, nor to give

The People v. Robinson.

jurisdiction of parties or subject matter, or jurors. It gave no new or additional power, and imposed no duties that were not otherwise imposed.

VII. It is *too late* to raise the question *after a trial*. It is *waived* by not being taken in time. (1 *Arch. Cr. Pl.* 16 ed. 67, 18; *Whar. Cr. Law*, 863; *Com. v. Smith*, 9 *Mass.* 107; *Whar. Cr. Law*, 3d ed. 228, 229.)

1. It should have been taken (if at all) by a challenge to the *whole array* of jurors or to them *individually*. Such is the spirit and object of the whole practice in regard to *challenges*. They have no other object. They may as well be dispensed with *altogether*, if they are not applicable in this very case.

2. All challenges to the *array*, and all objections to individual jurors, being taken away, except those expressly reserved by the statute, the objection in question has no longer any foundation, and must be entirely disregarded. (2 *R. S.* 724, § 27, 28.)

3. No such objection can touch the validity of the indictment, *after trial*. The judgment record begins with the *indictment*. If that is not *quashed*, or is not bad *upon its face*, it operates as a solid foundation stone for the judgment. Before trial it may be set aside, but not after. It does not affect the guilt or innocence of the accused. Unless impeached at the proper time, like every other record, it imports absolute verity. (*People v. Hulbert*, 4 *Denio*, 133; *People v. Griffin*, 2 *Barb.* 427.) So also in regard to a trial jury. (*Dayharsh v. Enos*, 1 *Selden*, 531; 2 *R. S.* 733, *sec.* 2; *Code*, *sec.* 21.)

VIII. The precept is never necessary, except for *special* or *extraordinary* terms of the Oyer and Terminer appointed by the special commission of the governor, or the warrant of a circuit judge.

1. The practice of requiring a precept originated under the Laws of 1813, (1 *R. L.* 339, § 16), and previous statutes of which that was nearly a transcript, when there were no *stated periods* fixed by *statute* for the courts. Hence the requirement of the district attorney's precept to the sheriff as a matter of *precaution* to *ensure* notice of the *time and place* of holding same.

The People v. Robinson.

It was no more a *venire* than the *clerk's list* or the *statute* itself, although it directed the summoning of jurors.

2. After the constitution of 1821, the terms of circuits and of Oyer and Terminer were fixed for two years in advance, by appointments of the circuit judges, which were notified as follows:

(1.) By filing same with county clerk.

(2.) By publication in state paper. (2 R. S. 201, &c.)

(3.) By notice served by county clerk as sheriff and others of the drawing of jurors, under which they drew and certified, and the sheriff summoned the jurors.

And no precept was necessary or required.

3. But there was another court—the Court of “Oyer and Terminer and *jail delivery*,” specially commissioned by the governor, or for special reasons appointed by the *warrant* of a circuit judge, *and to this the precept applied.*

The governor sent his commission to the secretary of state, and he served a copy upon the *district attorney*. The circuit judge sent his *warrant* to the *district attorney*. And in such cases (and such only) the district attorney issued his precept to the sheriff. (2 R. S. 205, § 32, 35, &c.)

4. The “Oyer and Terminer” and “Oyer and Terminer and *jail delivery*,” were different courts, and so recognized by the revised statutes. (See 1 R. L. 340, § 17; 341, § 23; 1 Ch. Cr. Law, 142, 145, &c. ed. of 1847; See 1 R. L. note.)

5. This theory makes the contents of the precept *consistent* and *appropriate*. It requires the summoning of grand and *petit* jurors, this being an *extraordinary* court. But for the ordinary and stated courts of Oyer and Terminer, no *trial* juries were drawn as we have before seen.

6. If the precept applies to the *stated* terms, then the district attorney, must, without delay, issue *precepts* for *each* of the terms embraced in the appointments; and the sheriff must, in like manner, publish his *proclamations* for *each* of said terms, making numerous publications and heavy expenditures. This was not intended.

The People v. Robinson.

IX. The provisions of the Revised Statutes in relation to the issuing of precepts, have been repealed by the Code.

1. The precept gave notice to the sheriff of the *time and place* of holding the court. So far, at least, it is expressly repealed by the Code. (*See Code*, § 17.)

2. There is no such court now in existence as the court of "Oyer and Terminer and jail delivery."

3. The court provides for the appointment of courts of Oyer and Terminer, both ordinary and extraordinary, and the mode and manner of making known the time and place of holding the same, and neither in express terms requires nor by reasonable implication renders necessary the precept of the district attorney. It was only necessary in the *extraordinary* court of Oyer and Terminer and *jail delivery*, before mentioned, and that court having expired, with it have also ceased the existence and necessity of the district attorney's precepts. (*Code*, § 17 to 25.)

X. The exception to the question put to deceased, how he felt after that glass of beer, was not well taken.

1. The question was of the same character with others which had been previously asked by the prisoner's counsel, or with their acquiescence.

2. It was a part of the *res gesta* of the transaction that was the subject of inquiry.

3. It tended to show the cause of his death, it was one of the *symp'toms* of disease, which must always, more or less, be derived from the statements of the patient.

XI. The exception to the proof offered to show the existence of poison in Miss Lubee's stomach, was not well taken.

1. It was testimony tending directly to show that the deceased came to his death by poison. He and Miss Lubee were together, they both drank of the same cup, at the same time, administered by the same person, on the same occasion.

2. Proof of a similar character had been allowed to be given, without objection, on the part of the prisoner's counsel, and in fact with their concurrence, as to the acts, symptoms, and cause of death of Miss Lubee.

XII. There was no error in the charge of the court on the subject of intoxication. The substance of the charge was that the voluntary intoxication of the prisoner (if it existed) did not excuse her from criminal responsibility for her acts committed in such a state.

1. This is in accordance with all the authorities. (*Coke Litt.* 247; 1 *Russ. on Crimes*, 7, 8; 4 *Black. Com.* 26; *Roscoe's Cr. Ev.* 783; 1 *Arch. Cr. Pl.* (6th ed.) 5, 6 and note 1; 1 *Hale P. C.* 32; *Barbour's Cr. Treatise*, 267; 2 *Arch. Cr. Pl.* 2062, note; *Whar. Cr. Law*, 13, 14.)

2. By the common law it was necessary in all cases to establish the existence of *malice*, "malice aforethought," in order to constitute murder. It was an essential ingredient of the crime. (*See above cases.*)

3. It is equally clear that by the common law, voluntary intoxication, even when carried to such an extent as to deprive a party temporarily of reason, did not mitigate, but rather aggravated the crime. It was still *murder*; and it was so pronounced, not precisely because it necessarily implied the existence of malice, but principally from motives of public policy, because such a construction was essential to the safety and protection of the citizen. (*United States v. Drew*, 5 *Mason*, 28.) *United States v. McGluz*, 1 *Curtis*, 1; 1 *Beck's Medical Juris.* 627; *Cornwell v. The State*, *Martin & Yerger*, 157; *Swan v. The State*, 4 *Humph.* 136.

4. The rule is the same under our Revised Statutes, which pronounce homicide to be murder, "when perpetrated from a premeditated design to effect the death of the person killed or of any (other) human being." (2 *R. S.* 657, § 5.)

(1.) Such was the *intention* of the revisers. The language of *this* section, as reported by them, is precisely like that adopted by the legislature, except the word "other." Their intention was in this particular, in defining the crime, to make "no departure from the present law," by changing the phraseology. (*See Revisers' Notes to this section*, 3 *R. S.*, 2d ed., 808, 809.)

For this definition of murder, (in substance) they expressly refer to 1 *Hale, P. C.* 50.

The People v. Robinson.

(2.) The words "premeditated design," have the same meaning as "malice aforethought." (*People v. Clark*, 3 *Selden*, 385; *McDaniel v. The State*, 8 *S. & M.* 418; *People v. White*, 24 *Wend.* 552.)

In this case the court say: "In its definition of murder, our statute (Mississippi) instead of "malice aforethought," uses the words "premeditated design." In legal effect we regard them as the same.

(3.) The same principles of public policy and legal construction, which before the Revised Statutes made the drunken homicide (though temporarily bereft of reason) sufficiently chargeable with "malice aforethought," to make the killing murder, also charge him now with "premeditated design," and a murderous intent.

(4.) If the intoxication of the prisoner exculpates her from the charge of murder, it exempts her from punishment *entirely*, or at most, makes her crime manslaughter in the fourth degree, which may be punished by a merely *nominal* fine or imprisonment in a county jail. (2 *R. S.* 662, 663.)

(5.) The indictment is under the common law form, charging the act to have been done with *malice aforethought*, and this is proper. (*People v. Enoch*, 13 *Wend.* 159; *People v. White*, 22 *Wend.* 176; 24 *id.* 537, 571.)

And the proof required to bring the case within the present statutory definition of the offence is no more than was necessary under the former law. *People v. Clark*, 3 *Selden*, 385.)

Hence the old authorities apply.

(6.) The true test of criminal responsibility for murder, (except in cases of fixed or habitual insanity) is to be sought for in the *nature* and *characteristics* of the act of homicide, and the *means* by which it is perpetrated. If these indicate *malice* and an *intent* to kill, the crime is perfect, without reference to the state of *sobriety* or *intoxication* of the accused party.

(7.) The cases decided under the laws of other states, where different degrees of murder obtain, do not necessarily *conflict* with the views above expressed, and should not *control* this court.

The People v. Robinson.

(a.) They *all* class *poisoning* under the head of murder in the first degree without reference to the question of *premeditation* they assume that the act of poisoning necessarily implies *premeditation* and a murderous intent. *Lewis's U. S. Cr. Law*, 348 to 353; *Wharton's Cr. Law*; *Law of Homicide*, 354 to 356.)

(b.) They merely decide that evidence of the *fact* and *degree* of intoxication is proper for the *consideration* of the jury to enable them to judge of the quality of the act. They do not by any means reduce the act when committed in a state of *gross* and *senseless* intoxication to murder in the second degree. It being necessary under those statutes for the jury to fix the *degree* of murder, for which the accused should be convicted, it is declared to be proper to allow evidence of the intoxication of the prisoner, not to exempt him from criminal responsibility, not even to reduce the crime to manslaughter, but to *aid* in ascertaining the true grade of murder, whether of the first or second degree. (*Swan v. The State*, 4 *Humphrey*, 136; *Pirtle v. The State*, 8 *id.* 663; *Hall v. The State*, 11 *id.* 154.)

5. There is nothing in the facts of the case which called for a charge upon the point of *intoxication*, at least intoxication that deprived the accused of *consciousness or reason*, and consequently, even though the charge were *erroneous* in that particular, it would furnish no cause for setting aside the verdict. (*Shorter v. The People*, 2 *Comstock*, 193; *The People v. Clark*, 3 *Selden*, 385.)

By the Court, PARKER, P. J.—In charging the jury, the learned judge made use of the following expression. "It is my duty to say to you, gentlemen, that if she (the prisoner) was intoxicated to such an extent that she was unconscious of what she was doing, still the law holds her responsible for her act." And afterwards in another portion of the charge, the judge said, "though the prisoner may have been excited by strong drink at the time of the alleged offence, even to such an extent as not to know what she was doing, she must answer for the consequences; her self-inflicted insanity must not be allowed to avail her for her defence. The law still imputes to her a

The People v. Robinson.

murderous intent. Exceptions were taken by the prisoner's counsel to each of these parts of the charge, and their alleged erroneousness constitutes the first ground on which they now rely for a reversal of the proceedings of the Oyer and Terminer.

If the proposition, that the law would hold the prisoner responsible for her act though she was intoxicated to such an extent that she was unconscious of what she was doing, stood alone and unexplained by the context, so as to be distinctly presented for adjudication, I should have no hesitation in saying that it could not be sustained, for by conceding the unconsciousness of the prisoner it contains within itself, a relinquishment of the legal presumption, that the prisoner must have intended the natural consequences of her own acts. It would, therefore, condemn the act as the result of premeditated design, when it concedes on its face that none existed. The proposition standing by itself, would apply to a person reduced by intoxication to a state of insensibility; and would impute to him a premeditated design to take life, if he should by chance kill a person by stumbling against him or by rolling against him in a gutter. It would convict of murder a drunken mother, who should smother her infant in her embrace, or by overlying it in bed, however strong might have been her affection for her offspring. It is hardly necessary to say, that no sound legal construction could bring such a transaction within the statute definition of murder, which requires, in all cases like that now before us, a premeditated design to effect death. (2 R. S. 657, § 5.)

But it is apparent that it was not the intention of the judge to lay down any such proposition. The portion of the charge excepted to must be considered with reference to the facts of the case, and in connection with other parts of the charge which are necessary to a proper understanding of its import and meaning. The offence charged was that of murder by administering poison. The defence principally relied upon was insanity. It was not claimed, nor was there any evidence to warrant a claim, that the prisoner was so much intoxicated as to be bereft of her senses or unconscious of what she was

The People v. Robinson.

doing. On the contrary, design was apparent throughout the whole transaction. Whether that design was conceived and entertained by a mind sober or excited by strong drink, was not material, and whether by a mind sane or insane, was a proper subject for the consideration of the jury. The whole charge taken together shows, I think, that when the judge said the law would still hold the prisoner responsible for her act, though she was intoxicated to such an extent as to be unconscious of what she was doing, he had reference, not to a state of insensibility, but to a state of excitement or madness, the immediate consequence of indulgence in strong drinks. For, after putting a case by way of illustration, inconsistent with the construction claimed by the prisoner's counsel, and then stating that if it appeared that by the inscrutable visitation of Providence, the faculties of a man had become so disordered that he was no longer capable of discriminating between right and wrong, in respect to the act he had committed, then the law would pronounce him innocent of crime, he added: "But if his derangement be voluntary—if his madness be self-invited—the law will not hear him when he makes his intoxication his plea to excuse him from punishment." The whole of this portion of the charge taken together and the explanation contained in the other part of the charge excepted to, show, very satisfactorily, that the judge intended only to charge, that self-inflicted insanity, the immediate consequence of drink, would constitute no defence; and it could, I think, have been understood by the jury in no other sense.

To that extent, the rule has long been established at common law. (4 *Coke*, 125; 1 *Co. Litt.* 247; 1 *Hale*, 31; 4 *Black. Com.* 26.) "A drunkard" says Lord Coke, "hath no privilege thereby; but what hurt or ill soever he doeth, his drunkenness doth aggravate." (*Coke Litt.* 247.) Russell says, (1 *Russ. on Cr.* 7,) "with respect to a person *non compos mentis* from drunkenness, a species of madness which has been termed *dementia affectata*, it is a settled rule, that if the drunkenness be voluntary, it can not excuse a man from the commission of any crime, but on the contrary must be considered an aggravation

The People v. Robinson.

of whatever he does amiss." "*Nam omne crimen ebrietas incendit et detegit*" has become a maxim of the law. (4 *Black. Com.* 26.) The rule is otherwise when the drunkenness is not voluntary; as if a person by the unskillfulness of his physician, or by the contrivance of others, and without any volition on his own part, eat or drink such a thing as causes frenzy, this puts him in the same condition as other insane persons, and equally excuses him. (*Barb. Cr. L.* 268.) And in cases of *delirium tremens* or *mania a potu*, the insanity excuses the act, the frenzy being, not the immediate effect of indulgence in strong drink, but a remote consequence superinduced by antecedent drunkenness. (*Barb. Cr. L.* 268; *Dean's Med. Jur.* 587; 3 *Am. Jurist*, 5, 20.) These general principles are fully recognized in the modern English cases, (*Rex v. Patrick*, 7 *Car. & P.* 145; *R. v. Meakin*, *id.* 297; *Burrow's case*, 1 *Lewin C. C.* 75; *Rennie's case*, *id.* 76; *R. v. Thomas*, 8 *Car. & P.* 820,) and also in decisions in this country, (*McDonough's case*, *Ryon Med. J.* 294; cases cited in 1 *Beck's Med. Jur.* 627; *Bennett v. State*, *Mart. & Yerg.* 133; *Cornwell v. State*, *id.* 147; *Schuller v. State*, 14 *Miss.* 502; 6 *Law Rep. n. s.* 563; 1 *Wright's Ohio Rep.* 30; 8 *Iredell*, 330; *Wilson's case and Birdsall's case*, reported in *Ray's Med. Jur.* § 405, 406; *Kelley v. The State*, 3 *Smedes & Marsh*, 518; *U. S. v. Clarke*, 2 *Cranch C. C. R.* 158; *U. S. v. McGhee*, 1 *Curtis C. C. R.* 1; *State v. John*, 8 *Ired.* 330; *U. S. v. Drew*, 5 *Mason*, 28.) In the latter case, Mr. Justice Story reiterates and approves all the rules above quoted. At common law, therefore, there can be no doubt of the correctness of the charge on this point.

But it is supposed our statute has so far changed the common law definition of murder as to be inconsistent with the proposition that drunkenness does not excuse but aggravates the crime.

In those states in which murder has been divided by statute into degrees, it has been held, that if the accused was intoxicated to such an extent as to deprive him of the power to form a design, the offence would be no more than murder in the second degree. In Pennsylvania, murder in the first degree is

The People v. Robinson.

where the offence is perpetrated by means of poison, or by lying in wait, or in perpetrating or attempting to perpetrate any arson, rape, robbery or burglary, or by any other willful, deliberate and premeditated killing, and is punishable with death. Murder in the second degree, in that state, embraces "all other kinds of murder," and is punishable by solitary confinement, at labor in the penitentiary. (*Penn. Stat.* 1794.) In that state, it was held in the case of Haggerty, tried at the Lancaster Oyer and Terminer in 1847, that the prisoner could not be convicted in the first degree, if deprived by voluntary intoxication, of the power to form a deliberate design to perpetrate the act. The very able charge of the learned President Judge in that case will be found reported at length in *Lewis's U. S. Cr. Law*, 402. A similar opinion was expressed by Mr. Justice Daniel in the *Commonwealth v. Jones*, (1 Leigh, 612,) the statute of Virginia, on the subject of murder, being substantially like that of Pennsylvania. (*Virginia Stat.* 1796.) In Tennessee also, where a like division of murder into degrees is made by statute, it was held in *Haile v. The State*, (11 Humph. 154,) that in all cases where the question is between murder in the first degree and murder in the second degree, the fact of drunkenness may be proved, to shed light upon the state of mind of the defendant, so as to enable the jury to determine whether the killing sprung from a premeditated purpose, or from passion excited by inadequate provocation; and the degree of drunkenness need not be such that it deprives the defendant of the capacity to form a deliberate and premeditated design to take life. All these cases proceed upon the principle expressly declared by Judge Reese in *Swan v. The State*, (4 Humph. 136,) that although drunkenness, in point of law, constitutes no excuse or justification for crime, still when the nature and essence of a crime are made to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness may be a proper subject for the consideration of the jury.

All these decisions to which I have referred, as being made

The People v. Robinson.

in states where, by statute, murder is divided into degrees, were made in cases where death was caused by violence and where it became necessary to ascertain whether the act was deliberate and premeditated, so as to fall within the first degree. I am by no means prepared to hold that it might not be proper under our own statute to show the degree of drunkenness of the accused, for the purpose of ascertaining whether he had the power to premeditate the act, though, in the case of Haggerty above cited, Lewis, J., expresses the opinion that it is only in those states where murder is divided into degrees that drunkenness can be set up as a defence. (*Lewis' Cr. L.* 405.) Our statute has not divided the crime of murder into degrees, but it has limited and defined the offence; and a case can not be brought within the first subdivision of the section unless there be a premeditated design, in fact, to effect the death of the person killed or of some human being. The proposition laid down in *Swan v. The State*, seems to me to be incontrovertible and to be universally applicable, viz: that where the nature and essence of the crime are made by law to depend upon the peculiar state and condition of the criminal's mind at the time with reference to the act done, drunkenness may be a proper subject for the consideration of the jury, not to excuse or mitigate the offence but to show that it was not committed. There are many cases recognizing this distinction. (*Rex v. Grindley*, 1 *Russ. on Cr.* 7, subsequently questioned in *Rex v. Carrol*, 7 *Car. & P.* 145; *Regina v. Moore*, cited 6 *Law Rep. N. S.* 561; *Marshall's case*, 1 *Lewin C. C.* 76; *Regina v. Cruse*, 8 *Car. & P.* 541; *Pigman v. The State*, 14 *Ohio*, 555; *Rex v. Thomas*, 7 *Car. & P.* 817; *Rex v. Meakin*, *ib.* 297; *Pirtle v. The State*, 9 *Humph.* 663; *Add. Rep.* 257; *Wharton's Law of Homicide*, 369; *Wharton's Cr. L.* 92.

But it is only in cases where death is caused by personal violence that it becomes necessary even in those states where murder is divided into degrees to inquire whether the act was deliberate and premeditated, for the purpose of ascertaining the degree. For in all these states "poisoning" is specially placed under the head of murder in the first degree. Even in

The People v. Robinson.

Pennsylvania, Virginia and Tennessee, the defence of drunkenness could not, if proved, reduce the offence to murder in the second degree. The very term "poisoning" implies design and could not be criminally committed by a person in such a state of mind as to preclude premeditation. No case could possibly occur in which the act could be perpetrated by a person in a state of insensibility from intoxication; and the degree of drunkenness, if less than that, would not be a material subject for inquiry, for if there were enough mind left to conceive and perpetrate the act, there would be enough to subject the offender to legal responsibility.

If, in the case before us, the prisoner mingled arsenic with the drink of Lanagan for the purpose of effecting his death, or the death of any other person, she was guilty of murder, though excited, no matter to what degree, by intoxication at the time. There was no pretence that the mingling of the poison was the result of accident, but the most satisfactory evidence to the contrary. A person, stimulated even to the highest pitch of frenzy by strong drink, may still be capable of planning and executing a criminal design, and in such case, it is quite clear, that neither under our statute, any more than at common law, can drunkenness be alleged as an excuse for the act.

If I am right therefore in the construction I have put upon the language of the charge, no error was committed.

If I am wrong in that construction, and, if the abstract proposition excepted to can not properly be considered as modified and explained by other parts of the charge, still it seems to me the exception taken is not available under the decision of the Court of Appeals in the case of *Shorter v. The People*, (2 Comst. 173.) The proposition excepted to standing alone and as interpreted by the prisoner's counsel had no applicability whatever to the case, and could have no influence on the minds of the jury. There was not a fact or circumstance in the case to warrant an inference that the accused was in a state of unconsciousness or insensibility from intoxication. No case was presented calling for any expression of opinion on

The People v. Robinson.

such a state of mind. If therefore the charge was erroneous in that respect, under the authority last cited, it would not furnish a legal ground for awarding a new trial.

It is secondly alleged for error, by the counsel for the prisoner, that the omission of the district attorney to issue a precept to the sheriff of Rensselaer county, twenty days before the Court of Oyer and Terminer was held, requiring him, among other things, to summon a grand jury, was an omission fatal to the conviction in this case. This objection applies only to the grand jury, and not to the petit jury, before whom the issue was tried at a subsequent court. It is not claimed that there was any irregularity in drawing or summoning the grand jury. There has been no omission at all affecting the substantial rights of the prisoner. Every thing was done by the sheriff which he would have done if a precept had been issued and as he would have done it. At most, therefore, the objection is merely technical and was not made in form until since conviction.

In the view that I take of this objection, I do not propose to examine or decide whether the requirement of the statute (2 R. S. 206, § 37) is applicable to the stated courts of Oyer and Terminer or only to extraordinary courts of Oyer and Terminer and jail delivery, specially appointed: nor whether, if applicable to the former, it is intended to take the place of the *venire*, with all the incidents belonging to that process at common law, or is merely directory; nor the other questions which were so fully and ably discussed by counsel on the argument and which would properly have arisen before the court of Oyer and Terminer on a plea in abatement or a motion to quash the indictment for the alleged defect. Independent of these questions, it seems to me to be an obvious and conclusive answer to the supposed error that it is too late now to make the objection. The most that can be claimed for the alleged defect is, that it was an irregularity in the proceeding to organize the grand jury in no respect bringing in question the qualifications of the grand jurors or their fairness towards the accused. No injustice has been done to the prisoner. And

The People v. Robinson.

now, after pleading to the merits, and after trial and conviction, this mere irregularity is for the first time suggested.

No adjudged case has been brought to our notice in which it has been held that the want of a precept as to the grand jury was available after verdict. In the *People v. McGuire*, (a) recently decided in the fifth judicial district, such an opinion was expressed by Pratt, J., but the decision of the court in that case, as well as in the *People v. McKay*, (18 *John R.* 212,) was put solely upon the ground that the petit jury by which the cause was tried was summoned without a *precept* or *venire*. In the *State v. Nichols*, (2 *Southard Rep.* 539,) the question arose on a motion to quash the indictment, and the defendant was permitted to withdraw his plea of not guilty, to enable him to make the motion. So, too, in the *State v. Chase*, (1 *Spencer R.* 218,) the question was presented on a motion to quash the indictment. In both these cases the indictment was quashed on the ground that the grand jury was summoned by the sheriff without process. In the *State v. Williams*, (1 *Rich. Rep.* 188,) and the *State v. Dozier*, (2 *Speers R.* 211,) motions were made in arrest of judgment, on the ground that both the grand and petit juries were summoned by writs of *venire* without seals. According to all the authorities cited on this point, it was a sufficient reason for arresting the judgments in those cases that there was no valid *venire* for the petit jury, and the motions would have been granted without reference to the grand jury. When the indictment is sufficient on its face, there seems to me good reason for not going back of the petit jury and the trial, in inquiring, after conviction, into the regularity of the proceedings. There is here no question of jurisdiction. The court had jurisdiction both of the person and of the subject matter.

The statute has limited the grounds of challenge to individual grand jurors and required such challenges to be made before the jurors are sworn, (2 *R. S.* 724, § 27,) and (*id.* § 28) it has abolished challenges of grand jurors to the array. Judge Nelson is said to have held in the Circuit Court of the U. S. in the

(a) Vide *supra* page 148.

The People v. Robinson.

"*Jerry rescue*" cases, that by taking away the right to challenge grand jurors to the array, the statute had, by implication, taken away the right to raise the objection in any form. But, in the case of the *People v. McGuire*, Mr. Justice Pratt expresses his dissent from such a conclusion. At the least, I think it is fair to say that the statute seems to discourage objections to the grand jury, who can do no more than make the accusation.

We are not without authority for holding that it is too late to raise a question of this character, for the first time, after conviction.

In the *People v. Griffin*, (2 Barb. S. C. R. 427,) after the petit jury had been impaneled and the case on the part of the people had been gone through with, the defendant sought to avail himself of the objections, that the presiding judge was not present when the clerk administered the oath to the grand jury who found the bill of indictment, and that the required oath was not administered at all to some of the grand jurors: but the Supreme Court said "the objection was clearly too late, and it would have been unprecedented to allow this collateral issue to be raised at so late a period."

In *Wa-Kon-chaw-neck-Kaw v. The United States*, (1 *Morris Iowa Rep.* 332,) one of the grounds of error was that the record did not show that the indictment was endorsed by the foreman of the grand jury as "a true bill;" and it was held, that the endorsement required by statute was merely directory, and that if there was other proof on the record that the grand jury returned the bill, it was sufficient. That the object of the bill of indictment was merely to put the party accused upon his trial, and that after a defendant had so far admitted the sufficiency of the indictment as to consent to go to trial, especially after the unanimous verdict of the petit jury, it was too late to question the irregularity of the proceedings by which he was put on trial. In that case the court refused to follow the decision in *Webster's case* (5 *Greenleaf*, 432,) where a similar omission was held fatal on motion in arrest, the court in Maine having treated it as a defective indictment.

The People v. Robinson.

In the *State v. Underwood*, (5 *Iredell*, R. 96) and *State v. Duncan*, (*ib.* 98,) a new trial was moved for, on the ground that the grand jury had been drawn by a boy of thirteen years of age, in violation of the statute, and that such illegal drawing might have affected the composition of the petit jury, and it was decided that the objection, if a valid one at any time, came too late, and that it should have been made before the petit jury was sworn, in the form of a challenge to the array.

And it seems to be well settled in most of the states that an objection to the qualification of grand jurors, or to the mode of summoning or impanneling them, must be made by a motion to quash or by a plea in abatement, before pleading in bar. (*State v. Martin*, 2 *Iredell*, 101; *State v. Lamon*, 3 *Hawks*, 175; *State v. Herndon*, 5 *Blackf.* 75; *Vattell v. State*, 4 *ib.* 72; *State v. Freeman*, 6 *ib.* 248; *State v. Seaborn*, 4 *Dev.* 305. On this subject see also, *Wharton's Cr. L.* 3d ed. 226, 229, 975; *Arch. Cr. Pl.* 67; 9 *Mass.* 107; *Com. v. Chauncey*, 2 *Ashmead*, 90.) By our statute (2 *R. S.* 728,) no trial, judgment or proceeding on an indictment can be affected by reason of any defect or imperfection in matters of form which shall not tend to the prejudice of the defendant.

Having come to the conclusions above expressed, this case presents no point in our judgment, which would require, or authorize this court to grant a new trial. It may be, as is claimed by the defence, that the evidence of insanity strengthened by the absence of any apparent motive for the act called for a different verdict, but if the jury erred on that question of fact, this court has no power to correct the error. The only remedy for such a mistake lies with the Oyer and Terminer, on a motion for a new trial, (1 *Park. C. R.* 625,) or with the executive, on an application for pardon.

Proceedings of the Oyer and Terminer affirmed and order made that the indictment, bill of exceptions, and all the proceedings be remitted to the court below, to the end that judgment might be rendered on the verdict. (2 *R. S.* 741, §24; 11 *Wend. R.* 568.)

SUPREME COURT. At Chambers, Albany, August 2, 1855.
Before *Parker*, Justice.

THE PEOPLE *vs.* PATRICK KENNEDY.

A person arrested under a warrant, for a misdemeanor, in violating the act entitled "an act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, when brought before the magistrate, has a right to give bail for his appearance at the next Court of Sessions, or the next criminal court to be held in the county.

That right conferred, in such cases, by the provisions of the Revised Statutes, is not taken away either by express terms or by implication, by the 5th section of said act.

A provision denying to a person so arrested the right to give bail, and compelling him to be tried for said offence by the magistrate as a court of Special Sessions, would be unconstitutional and void under art. 1, sec. 2 of the state constitution.

The words "trial by jury," as used in the state constitution, mean a jury of twelve men, as at common law.

The words "heretofore used," in the same section, mean "in use at the time of the adoption of the constitution."

At the time of the adoption of the constitution, a person charged with the commission of a misdemeanor, had a right to a trial by a jury of twelve men. He could secure this right when brought before the committing magistrate, by giving bail to appear at the next criminal court.

The constitutional provision, under which a person charged with a misdemeanor is entitled to a trial by jury, is applicable to any offence of the same grade created by statute after the adoption of the constitution.

History of the Court of Special Sessions since its first organization, with comments upon its powers and jurisdiction.

This case came before Justice Parker, at Chambers, on a writ of *habeas corpus*. It was set forth in the petition on which the writ was allowed, that the prisoner was restrained of his liberty in the custody of James McNutt, a police constable, under a warrant issued by John O. Cole, Esq., a police justice of the city of Albany, for an alleged violation of an act entitled "An act for the prevention of intemperance, pauperism and crime," passed April 9, 1855. That on being arrested by the constable and brought before the said justice, the prisoner offered to

The People v. Kennedy.

give bail for his appearance at the next Court of General Sessions, to answer to any indictment that might be found against him, and that the said justice refused to take such bail. These facts being admitted by the return, the prisoner's counsel claimed that the alleged offence was bailable, and asked that the prisoner be discharged on giving bail.

John K. Porter, for the prisoner

Samuel G. Courtney, (Assistant Dist. Att'y,) for the people.

PARKER, J.—The offence with which the prisoner is charged, was created and declared to be a misdemeanor by the 4th section of the act under which he is prosecuted. It is to be tried before the same tribunals and in the same manner as other misdemeanors, unless the statute has specially directed otherwise.

If the offence charged were any other misdemeanor, the prisoner would have an undoubted right, on being brought before the justice under the warrant, to give bail for his appearance at the next criminal court having jurisdiction. (2 R. S. 709, §21; 710, §29.) The prisoner is thus, in all other like offences, secured the right of having his case passed upon by a grand jury, and, if indicted, of being tried by a jury of twelve men. And the magistrate before whom the complaint is made, can not take any step to organize a court of Special Sessions for the trial of the offence, till twenty-four hours have elapsed after the prisoner has been required to give bail. (2 R. S. 711.) If the prisoner fails to give bail within that time, it will be deemed a waiver of the right, and the magistrate may proceed as a Court of Special Sessions to try the offence. These are the general provisions applicable to all other offences of this grade.

But it is claimed that by the act creating the offence, the right to give bail, when brought before the magistrate, is specially taken away, and that the magistrate is required to

The People v. Kennedy.

proceed immediately and try the case as a Court of Special Sessions.

That portion of the act relied upon is as follows:

§ 5. Every justice of the peace, police justice, county judge, city judge, and in addition, in the city of New York, the recorder, each justice of the Marine Courts, and the justices of the District Courts, and in all cities where there is a Recorder's Court, the recorder, shall have power to issue process, to hear and determine charges and punish for all offences arising under any of the provisions of this act, and they are hereby authorized and required to hold courts of Special Sessions for the trial of such offences, and under this act to do all other acts and exercise the same authority that may be done or exercised by justices of the peace in criminal cases and by courts of Special Sessions, as the same are now constituted; and the term magistrate, as used in this act, shall be deemed to refer to and include each officer named in this section. *Such court of Special Sessions shall not be required to take the examination of any person brought before it upon charge of an offence under this act, but shall proceed to trial as soon thereafter as the complainant can be notified, and for good cause shown, may adjourn from time to time not exceeding twenty days,"* &c.

The right of the prisoner to give and of the magistrate to take bail is certainly not taken away in express terms by this section, but it is claimed that the intention to take it away is implied from the words above *Italicised*. Those words, it will be seen, are merely directory to the court of *Special Sessions*. They have no reference to the acts or duties of the examining magistrate before organization of a court of Special Sessions.

An examining magistrate may take bail; a court of Special Sessions has no such power, (2 R. S. 710.) Formerly, the justice to whom the complaint was made, if the prisoner omitted to give bail, called in two other justices to sit with him to constitute a court of Special Sessions, (2 R. S. 711, § 3.) But since the act of 1845, a single magistrate may act as such court. He acts, however, in different capacities in different

The People v. Kennedy.

stages of the proceedings. As the magistrate to whom the complaint is made, he may take bail, if the prisoner elects to give it, and whether he can proceed further as a court of Special Sessions, and try the cause depends upon the fact whether the accused has given bail within the time allowed him by law for that purpose. There can be no Court of Sessions organized, in any case, until the accused has elected to be so tried, or has waived the giving of bail. The question of bail only belongs to the preliminary proceedings.

There is nothing in the language above quoted modifying, in any respect, the powers of the magistrate in the steps preparatory to the trial. On the contrary, the statute in question expressly authorizes him, in addition to holding courts of Special Sessions, for the trial of offences under that act, "to do all other acts and exercise the same authority that may be done or exercised by justices of the peace, in criminal cases, and by courts of Special Sessions, as the same are now constituted."

But suppose the language of the act had been "*such magistrate shall not be required to take the examination, &c., but shall proceed to trial, &c.*" It would in that case authorize the omission of the examination of the prisoner, which is required by 2 R. S. 708, § 14, but not the omission of any other of the preliminary proceedings. It is only the examination of the person charged that is to be omitted. The complainant and the witnesses produced in support of the prosecution are still to be examined as required by 2 R. S. 708, § 13, and the committing magistrate as such, must still decide upon the sufficiency of the evidence to hold the accused to bail, as required by 2 R. S. 709, § 21. It takes away no legal right from the accused, to say the magistrate shall proceed to trial as soon as the complainant can be notified. A similar direction to expedite the proceedings will be found under the general act, (2 R. S. 708, § 13, 712, § 6.) It means that he shall proceed, unless some other legal and authorized step be taken which prevents it.

The right to give bail in such cases has never, in any case,

The People v. Kennedy.

been taken away by statute. It secures an opportunity of being tried by a jury of twelve men; a right, so highly prized, as to be deemed worthy of constitutional protection; and the further right to have the case tried by a court of record, after it shall have passed the ordeal of a grand jury. Presumed to be innocent until he can be proved guilty, the accused may, of right, claim that all the forms of law shall be complied with, and may not regard it as a mere formal question, but rather as matter of substance whether he shall be tried by a jury of six men summoned by a constable, or by a common law jury of twelve, drawn indifferently from the body of the county.

Such a right can not be taken away by implication.

In *Bennet v. Ward*, (3 Caines' R. 259,) it was held, that where a statute admits of two constructions, it is advisable to give it that which is consonant to the ordinary mode of proceeding before magistrates; particularly, when by so doing a trial by jury was secured; and the court added that a summary mode of proceeding is always strictly construed by the courts, and is not to be adopted but where the language of the law is positive and unequivocal.

My attention has been called by the counsel for the prosecution to an act passed at the last session of the legislature, entitled "An act to enlarge the jurisdiction of the courts of General and Special Sessions of the peace in and for the city and county of New York." The act was passed three days after the passing of the act under which the arrest in this case was made; and it is supposed the fifth section of it, by securing to the accused, in all cases of misdemeanor, the right to elect to have his case tried by the General Sessions of the peace, designed to except the city of New York, in this respect, from the provisions of the previous act, and was thus, so far, a legislative construction of it. But it is quite clear that it was not so designed, and can have no such effect. It is only a qualification made necessary, not by the previous act, but the previous part of the same section, which gives to courts of Special Sessions in the city of New York, exclusive jurisdiction of all complaints for misdemeanors. Having given such

The People v. Kennedy.

a broad jurisdiction, it became necessary to qualify it by the exception, so as to restore to the accused the same right to elect to be tried by the General Sessions which he would have had throughout the state under the general provisions of the Revised Statutes.

It adds nothing to the strength of the prosecutor's case, that by the twenty-fourth section all previous statutes incorporated with that act, are repealed; there being, as I have shown, no inconsistency between the provisions in question and the previous enactments.

I concur, therefore, in the decision made by Mr. Justice Morris in the case of *Heustis*, in holding that the act in question has not taken away the right to give bail. In this misdemeanor, as well as in all others, the party accused has a right to give bail before the examining magistrate, to appear and answer to the charge at the next Court of Sessions or the next court having criminal jurisdiction to be held in the county.

If I am wrong in this construction of the act, and if it does indeed compel a trial of the offence before a court of Special Sessions, the constitutionality of that provision of the act may well be doubted.

It is declared by the constitution of this state, (*art. 1, § 2*), "The trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever." The obvious meaning of the expression "heretofore used," is, "in use at the time of the adoption of the constitution." What is meant by the expression "trial by jury?" Does it mean a common law jury of twelve men, or a jury of six men, as provided in a trial at Special Sessions? I think there can be no doubt on this point. If the legislature may reduce a jury in number to six, they have the same right to reduce the number to one, and thus make a jury of one a compliance with the requirement of the constitution. On this subject the Court of Appeals have recently expressed an opinion. In *Cruger v. The Hudson River Railroad Company*, (2 Kernan R. 198,) Johnson, J., says: "That term (a jury) when spoken of in connection with

The People v. Kennedy.

trial by jury in the second section of the same article, imports a jury of twelve men, whose verdict is to be unanimous. Such must be its acceptation to every one acquainted with the history of the common law, and aware of the high estimation in which that institution, so constituted, has for so long a period been held." (See also 3 *English*, 446-7; *State v. Cox*; 5 *Smedes & Marshall*, 664; 3 *Peters R.* 446-7; 4 *Wheaton R.*, 242-3-4; 10 *Wendell*, 457-8; 2 *Kent's Com.*, 13, note C.)

If, therefore, the accused, in an offence of this grade, had a right to a trial by jury, in the constitutional sense of the word, when the constitution took effect, his right can not be taken away by a subsequent act of the legislature. It is no answer to say that this offence did not exist at the time the constitution took effect, but has been since created by statute. If the offence be such that it would have been entitled to a trial by jury, if created before the constitution was adopted, it can not be deprived of the same right when created afterwards. Any other view would enable the legislature to create a new offence and call it a felony, or by any other name, and make it triable by a court of Special Sessions, and punishable with death. If you deny the constitutional control over new as well as old offences, you make the power of the legislature omnipotent, and have no protection against its despotism. The true rule undoubtedly is that when the legislature create a new offence, it is placed on the same footing as other previous offences of the same grade, and is equally governed by the provisions of the constitution.

The question then arises, had a person charged with a misdemeanor of this character, a right in all cases to a trial by jury under our laws, as they existed at the adoption of the present constitution? There was a right to proceed summarily, and without a jury in certain cases, but not in offences of this grade. For example, disorderly persons, who are enumerated in (1 *R. S.*, p. 538, § 1,) and vagrants, (1 *R. S.* 632,) might be punished summarily and without trial by jury. A trial by jury not being previously used in these cases, it is not now re-

The People v. Kennedy.

quired (*Duffy v. The People*, 6 Hill, 75). They are not cases within the contemplation of the constitution (*In re, Smith*, 10 Wend. 449). So, too, petit larceny is expressly excepted from sec. 6 of art. 1, which requires an indictment for all infamous crimes, and is placed under the regulation of the legislature. But at the adoption of our present constitution, in all cases of misdemeanor, and there was a great variety of them, there was the right of trial by jury. Selling liquor without license (1 R. S., 682, § 32) was then as now declared a misdemeanor, but it could only be tried on indictment and by a full jury.

Courts of Special Sessions for the trial of petit larceny, misdemeanors, breaches of the peace, and other offences under the degree of grand larceny have long existed here. They were first authorized by an act passed by the colonial legislature in 1744. (1 *Smith & Livingston*, 339; *Van Schaick*, 240.) After the revolution the same powers were given to three justices by the act of the 24th of March, 1787; (1 *Greenleaf*, 424,) and re-enacted in the revisions of 1801 and 1813; *C. & G. Webster*, 306; 2 R. S., 507,) and also in the revision of 1830, (2 R. S. 711.) Various modifications and amendments have taken place at different times, and, under the Revised Statutes, only certain specified misdemeanors and petit larceny are triable in that court.

In the earlier history of that court, the causes were tried by three justices of the peace without a jury; and it was not till 1824 (*Session Laws of 1824*, 297, § 47,) that a jury was authorized to be summoned to try the case on the application of the accused. It was not, however, a common law jury of twelve men, but, as now, a jury of six drawn from twelve, summoned by the constable.

It is an important feature in the legislation, in regard to this court of Special Sessions, that throughout its whole history there has never been an attempt made to compel the accused to be tried by that tribunal if he was willing to give bail. In the earliest act in this state, and in all subsequent enactments, the right of the accused to give bail to appear at the next criminal court was expressly given, and it was not

The People v. Kennedy.

until he had failed to give bail, after ample time secured for that purpose, and it was because he failed to give it, that the justice, to whom the complaint was made, proceeded to organize a court of Special Sessions for the trial of the offence. He might fail to give bail, either by choice or inability, and at the same time refuse to be tried by a court of Special Sessions. In such a case his trial by such a tribunal would be in fact compulsory. But it was not unconstitutional, because the law which deemed such refusal a waiver, and authorized such trial, was in existence at the time of the adoption of the constitution. (*Murphy v. The People*, 2 Cowen, 815, and note.)

If, in the act under which the prisoner is arrested, there has been an attempt to compel a person charged with a misdemeanor to go to trial without the privilege of giving bail, it is the first time there has been such an enactment in this state.

The right to give bail when arrested for crime is one of vital importance to the accused. It involves directly the right of trial by jury. Giving bail is an election to be tried by jury. Neglecting to give it is an election to be tried by a Court of Special Sessions, without a common law jury. It is regarded as a waiver of the constitutional right. The right to this election, on the part of the accused, even in the smallest offences triable by the court of Special Sessions, has always existed in this state, and existed in full force and unimpaired, and at the time of the adoption of the present constitution. The right of trial by jury thus enjoyed was protected by the constitution of 1777 (*sec. 41*,) and by the constitution of 1821 (*art. 7, § 2*,) in language almost identical with that of the provision in the present constitution.

It is not under the sixth section of article one of the constitution, that this question is presented. That protects the citizen against being called on to answer for a capital or otherwise infamous crime, unless on presentation or indictment of a grand jury. It does not apply to misdemeanors, and is not therefore applicable to this case. The legislature might, perhaps, provide for bringing misdemeanors before the courts for trial,

The People v. Kennedy.

without presentment or indictment. But under the ample protection of the second section, securing a trial by jury in all cases in which it has heretofore been used, and declaring it shall remain inviolate forever, it can not, either directly, or indirectly, compel the trial either of a misdemeanor or of a civil suit, unless by a jury of twelve men, except in cases in which such compulsion might have been previously exercised.

In conclusion, I hold that as the right to give bail, and be tried by a constitutional jury, existed in all cases of crime at the time of the adoption of the constitution, it can not be taken away by any subsequent statute; and any legislative enactment depriving the accused of that right would be utterly void.

Whichever view, therefore, is taken of the construction of the clause of the statute in question, it does not deprive the prisoner of his right to give bail to appear at the next Court of Sessions; and I shall accordingly order his discharge on his giving approved security, so to appear, in the penal sum of \$500.

The defendant then gave bail for his appearance at the next General Sessions, in September.

SUPREME COURT. At Chambers, Poughkeepsie, August 9, 1855
Before *Dean*, Justice.

THE PEOPLE *vs.* JOHN JOHNSON.

The right to a trial by a common law jury of twelve men, in cases of misdemeanor, is secured by the constitution of this state, and can not be taken away by the legislature.

The law in reference to an examination applicable to other cases of misdemeanor, is alike applicable to offences for selling intoxicating liquor contrary to the provisions of the act "to prevent intemperance, pauperism and crime," passed April 9, 1855.

A person charged with the offence of selling intoxicating liquor contrary to the provisions of that act, has the right to give bail to appear and answer at the next criminal court having cognizance of the offence, and in which he may be indicted, as in other misdemeanors triable by a Court of Special Sessions.

The facts of this case are set forth in the opinion of the judge.

DEAN, J.—The prisoner was arrested on a warrant issued by the recorder of this city, charging him with a violation of the act of April 9, 1855, entitled "an act for the prevention of intemperance, pauperism and crime." When taken before the recorder, he demanded that an examination, as in other criminal cases, should be had, which was refused. He then offered to give good and sufficient bail, and such as the recorder would approve, for his appearance at the next criminal court having jurisdiction of the offence, and in which an indictment might be found. The recorder refused to take bail, on the ground that the act in question did not permit the prisoner to give bail for his appearance to answer for the offence charged, at a criminal court having jurisdiction of the offence, but required him, the recorder, as a court of Special Sessions to proceed with the trial of the case; whereupon the prisoner presented his petition to me for a writ of habeas corpus to inquire into the cause of his detention. The prohibitory act, as it is usually termed, contains twenty-six sections, some of which are long,

The People v. Johnson.

perhaps unnecessarily so. The design of the law, together with the means used to effect that design, are alike novel in the legislation and jurisprudence of this state, and it would be indeed strange if the zeal which has succeeded in procuring the passage of the law, which promises to "prevent intemperance, pauperism and crime," should not at some point have overstepped the bounds of legislative power, or failed in using language with sufficient precision to withstand the searching criticism of legal learning and professional acumen. If in any instances the former has occurred, it is the duty of the courts to restrain the operation of the law to the legitimate boundaries prescribed by the constitution for the exercise of legislative power; and if its framers have any where failed in the use of apt and precise language to express the true intent of the enactment, it is also the duty of the courts to point out the defects, that subsequent legislatures may provide the remedy. In the case now to be decided it is only necessary to examine and construe a single section of this law, and whatever conclusion is reached, it in no manner affects any other portion of the act. The right to a trial by jury—that is, a jury of twelve men, selected by ballot from the body of the county, and impaneled as in other criminal cases—is what the prisoner claims. This right is denied by the prosecution, and instead of such trial it is claimed that a person suspected of having sold intoxicating liquors in violation of law, can be arrested, and without any examination of the complainant and his witnesses, without any indictment, with no specification except the general statement contained in the complaint, can be compelled to proceed to trial before an inferior magistrate, with but a jury of six men, and if convicted can be fined and imprisoned, and disqualified from acting as a juror upon any trial under the provisions of this act. If the law is as contended for by the prosecution, then the trial for the misdemeanor created by this statute is on a different footing from any other, for it was not pretended on the argument, but that a person charged with any other offence triable by the Court of Special Sessions might, if he chose, give bail in the manner in which the prisoner pro-

The People v. Johnson.

posed in this case. If the right exists, I must take the bail and discharge the prisoner. If it does not, he must be remanded for trial. There is probably no one subject which has been so jealously guarded, and so uniformly lauded since the date of the celebrated magna charta, as the common law right to a trial by jury. So important was it deemed that it was thought necessary to make provision for it in the fundamental law by an amendment to the federal constitution, which is in these words: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." This applies to all offences cognizable in the federal courts; so by the bill of rights in this state, it is declared, "In all criminal prosecutions, the accused has a right to a speedy and public trial by an impartial jury, and is entitled to be informed of the nature and cause of the accusation." The constitution of the state, as adopted in 1846, provides that "The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." Judge Story in his Commentaries on the Constitution, (vol. 3, § 1773,) says: "It is hardly necessary in this place to expatiate upon the antiquity or importance of trial by jury in criminal cases. It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and religious liberties, and watched with an unceasing jealousy and solicitude. * * When our more immediate ancestors removed to America, they brought this great privilege with them as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." This right, therefore, having been held of such vital importance for so many centuries, would not be relinquished without a struggle, and can not be taken away by an inference drawn from ambiguous or doubtful words, even if the legislature possessed the power. But I have no hesita-

The People v. Johnson.

tion in saying that, as in 1846, the time of the adoption of our present constitution, the person accused of a misdemeanor, of whatever grade, had a right at his election to a trial by a common law jury of twelve men; and as that constitution which is the fundamental law—the permanent will of the majority—declares that “the trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever.” The legislature is prohibited from depriving a person accused of a criminal offence of the right to a trial by such a jury; and, consequently, that if this law did, in express terms, deprive the accused of such right, I would hold that portion of it void, and to be disregarded by every judicial tribunal. But the conclusion to which I have arrived on the construction of the section of the act on which the prisoner was arrested, renders any further discussion of this point unnecessary. That portion of the fifth section of the act which bears upon the question raised in the present case is,

§ 5. Every justice of the peace, police justice, county judge, city judge, and in addition, in the city of New York, the recorder, city judge, each justice of the Marine Court, and the justices of the district courts, and in all cities where there is a Recorder’s Court, the recorder, shall have power to issue process, hear and determine charges, and punish for all offences arising under any of the provisions of this act; and they are each hereby authorized and required to hold courts of Special Sessions for the trial of such offences, and under this act to do all other acts, and exercise the same authority that may be done or exercised by justices of the peace in criminal cases, and by courts of Special Sessions, as the same are now constituted; and the term magistrate, as used in this act, shall be deemed to refer to and include each officer named in this section. Such court of Special Sessions shall not be required to take the examination of any person brought before it upon charge of an offence under this act, but shall proceed to trial as soon thereafter as the complainant can be notified.

By this section the magistrates named have authority to issue process, to hear and determine charges, to punish for

The People v. Johnson.

offences under the act, to hold courts of Special Sessions for the trial of the offences, and to do all other acts that justices of the peace may do in criminal cases, and exercise the same authority that justices of the peace and courts of Special Sessions may exercise. But it confers no new powers upon courts of Special Sessions. This gives to each of these magistrates full authority to have an examination as in other criminal cases to determine whether there is probable cause to hold the prisoner for trial or to demand bail. And I do not see from this section how it can be held that the prisoner, if he does not elect to be tried by a court of Special Sessions, can be deprived of the statutory provision permitting an examination of the complainant and his witnesses in each case. The only part of the section which can be supposed to take away the right to this examination and the right to require the magistrate to discharge him on giving bail, is the following sentence: "such court of Special Sessions shall not be required to take examination of any person brought before it, upon charge of an offence under this act, but shall proceed to trial as soon thereafter as the complainant can be notified." This declares only that the court of Special Sessions shall not be required to take the examination of the prisoner. As that court never possessed the power to take such examination, the probability is that the legislature intended to relieve the magistrate issuing the process from the burden of an examination in the case of complaints for selling intoxicating liquors. And as this was within the power of the legislature, had any language been used which could effect that object, I would have felt bound to so construe it as to carry out the intention of the legislature. But I can not, by any possible construction, say that the words "such court of Special Sessions," mean "such magistrate," &c. And without substituting words other than those now in the law, the right of the prisoner to an examination is not taken away. And as my power is not legislative, but judicial only, I am not at liberty to change the act in a single letter, even to accomplish the intent of its framers. But it is contended that as this sentence requires the court of Special Sessions to

The People v. Johnson.

proceed to trial as soon after the prisoner is brought before it, as the complainant can be notified that the prisoner is by this deprived of the right to give bail, and the magistrate is not empowered to take it. The difficulty with this construction is, that the Special Sessions can only be organized after the prisoner has elected to be tried by such court, or has for twenty-four hours neglected or refused to give bail. And, consequently, he is not brought before such court until after his right to give bail has either been waived by election or neglect. And more than this, the court of Special Sessions never possessed the right to take bail for any offence. Whereas the respective magistrates named in the section under consideration, each of them have by statute, 2 R. S. 710, "power to let to bail in all cases of misdemeanor." The offence with which the prisoner is charged, is by this act declared to be a misdemeanor, and as no part of the law in terms or by necessary implication, repeals the law authorizing these magistrates to take bail in all cases of misdemeanor, I must hold that the recorder should have taken bail when it was offered. By the acts constituting the Recorder's Court for this city, the recorder has the same jurisdiction as to criminal cases as justices of the peace throughout the state, and consequently whatever is said in reference to the powers and duties of the recorder, under this section, are equally applicable to justices of the peace, and every magistrate named in the fifth section. If it was the intention of the legislators to take away the ordinary right to an examination and bail, the act should have forbidden the magistrate before whom the accused is brought from taking such examination and bail. But there is no such prohibition. The confusion or mistake, if any there is, has arisen from the neglect on the part of the lawmakers to distinguish between the magistrates, as such, and the court of Special Sessions. The conclusions to which I have arrived in this case are:

1. That the right to a trial by a common law jury of twelve men in cases of misdemeanor is secured by the constitution, and can not be taken away by the legislature.

2. That the law in reference to an examination applicable

The People v. Johnson.

to other cases of misdemeanor is alike applicable to offences for selling intoxicating liquor contrary to the provisions of the prohibitory law.

3. That the person charged with an offence for selling intoxicating liquor contrary to the provisions of the prohibitory law, has the right to give bail to appear and answer at the next criminal court, having cognizance of the offence and in which he may be indicted, the same as in other misdemeanors triable by a court of Special Sessions.

The prisoner on giving satisfactory bail in the sum of \$500, conditioned as required by law, must be discharged. I have reached this conclusion on the examination of this case as an original question, but I am fully supported by two of my brethren, Judges Morris and Parker, each of whom have had a similar case before them, and have come to a like conclusion.

SUPREME COURT. Dutchess General Term, August, 1855.
Brown, S. B Strong and Rockwell, Justices.

THE PEOPLE vs. THOMAS TOYNBEE.

THE PEOPLE vs. PHILLIP BERBERRICH.

The act entitled "an act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, so far as it prohibits the sale of intoxicating liquors to be drank as a beverage, is in conflict with that portion of art. 1, sec. 6 of the state constitution, which declares that no person shall be deprived of property without due process of law, and is therefore void. Justice ROCKWELL dissenting.

The provision of the 5th section of the act, which requires a person accused to be tried before a court of Special Sessions, and deprives him of the privilege of giving bail to appear before the next criminal court, is unconstitutional and void, inasmuch as it takes away the right of "trial by jury" secured by the constitution of this state.

So much of the first section of the act, as declares that intoxicating liquor shall not be sold or kept for sale, or with intent to be sold, except by the persons and for the special uses mentioned in the act;—

So much of sections 6, 7, 10 and 12, as provides for its seizure, forfeiture and destruction;—

So much of 16th section, as declares that no person shall maintain an action to recover the value of any liquor sold or kept by him, which shall be purchased, taken, detained or injured, unless he can prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him;—

So much of section 17, as declares that upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale;—

And so much of section 25, as declares that intoxicating liquor kept in violation of any of the provisions of this act shall be deemed a public nuisance, are repugnant to the provisions of the constitution for the protection of liberty and property and absolutely void. Per BROWN, J.

The facts in these cases are sufficiently set forth in the opinion of Mr. Justice Brown. The secondly above entitled cause was argued by

J. Thompson and

T. C. Campbell (District Attorney) for the people.

The People v. Toynbee.

J. F. Barnard and
H. A. Nelson for the prisoner.

The first above entitled cause was argued by

John M. Van Cott and
N. F. Waring for the people.

John A. Lott and
A. Hadden for the defendant.

BROWN, J.—Phillip Berberrich, the defendant in one of these actions, was arrested under the act of the 9th of April, 1855, entitled "An Act for the Prevention of Intemperance, Pauperism and Crime," charged with having in his possession, with intent to sell and with having sold, intoxicating liquor called lager bier. He was brought before E. Q. Eldridge, Esq., county judge of Dutchess county, and upon a trial by a jury, was found guilty. At this stage, and before sentence, the proceedings were removed into this court by *certiorari*.

Thomas Toynbee, the defendant in the other action, was also arrested under the same act, without warrant, by John Mathews, a police officer, and brought before D. K. Smith, a police justice of the city of Brooklyn, and there charged with being in the act of selling intoxicating liquor, to wit: one glass of brandy — and also with having in his possession other intoxicating liquor, to wit: champagne wine, with intent to sell the same. The wine was seized by the officer. At the trial before the justice without a jury, sitting as a court of Special Sessions, Toynbee was found guilty, and sentenced to pay a fine of \$50, with \$5.87 costs, and to be committed until such fine and costs be paid, for a period not exceeding fifty-six days. It was also adjudged that the liquor seized be forfeited, and a warrant issued for its destruction. The defendant appealed to the general term of this court, and thus we have the principal questions which arise upon the construction of the

act — its force and obligation as a law, presented for the consideration and judgment of this court.

The object to be effected by the statute under which these proceedings are had, must be ascertained from an examination of its various sections, twenty-six in number. If its office is one of mere regulation — to prescribe by whom and to whom, and at what places, liquors in certain quantities may be sold — then it does no more than the excise law which it is thought to supersede; and although prejudicial to existing interests, and may subject certain classes to some privations and inconveniences, it is nevertheless a law of binding obligation, which the people must obey and the tribunals of justice enforce. If, however, its office and purpose is greater and more comprehensive than mere regulation; if it aims at prohibition, prohibition of sales as well as of general and ordinary uses, to an extent which deprives the subject of the law of its value, and strikes down the vast and varied interests concerned in its importation, sale and production; if it provides for the seizure, forfeiture and destruction of an article or thing, the product of human industry hitherto invested with the attributes of property, solely because its producers or owners design to make it the subject of sale and transfer, to deal in it and with it as property, and apply it to general uses, then the question assumes a very different character, and we are brought to inquire whether an act pregnant with such consequences, and armed with such unusual and dangerous powers, is really within the sphere of legislative authority. It is just to observe, that while sales by persons generally and for general uses are expressly forbidden, there is no positive interdict against its general use when lawfully acquired. Yet, as there can be no lawful sales after the act takes effect, except by the authorized venders for certain special purposes, and as the act is careful to impose one of its penalties upon purchasers from authorized venders, under a false representation that it is designed for an authorized use, it seems clear that the intent was to interdict the general use.

Section one forbids the sale, and the keeping for sale, or with

The People v. Toynbee.

the intent to sell, except in the cases enumerated in the subsequent sections, and also in the case mentioned in the last clause of the same section, which clause is supposed to be of doubtful import. The sales excepted from the prohibition of the first section, other than those in the latter clause, are sales to authorized venders, and sales by them for mechanical, chemical and medicinal purposes, and of wine for sacramental uses: also, sales of cider in quantities not less than ten gallons, sales of alcohol by manufacturers, of wine from grapes grown by the seller, and of foreign liquor in the original packages to authorized venders. Section four declares offences against the act misdemeanors and provides for their punishment by fines and imprisonment. Section five designates the officers who shall have cognizance of such offences, and prescribes the form of the proceedings and of the trial. Sections six and seven contain what are called the search and seizure clause; and section ten provides for the condemnation and destruction of the liquor. Section twelve authorizes sheriffs, marshals, constables and policemen to serve the process, arrest persons in the act of selling, and to seize without warrant liquor kept against the provisions of the act. The owner may interpose a claim to the liquor seized pursuant to the provisions of section seven, but he must first purge himself under oath of any design to disobey or evade the law, before he can be noticed or heard. Section sixteen deprives the owner of his right of action to recover the value of any liquor sold to a purchaser, or taken, detained or destroyed by a wrong-doer, unless he shall prove that such liquor was sold according to the provisions of the act, or was lawfully kept and owned by him. And section seventeen declares, that upon the trial of any action to enforce the penalties and forfeitures, proof of a delivery shall be deemed evidence of sale, and proof of sale shall be sufficient to sustain the averment of unlawful sale. Section twenty-five declares all liquors kept in violation of any of the provisions of the act a public nuisance. The abatement of public nuisances is one of the remedies by the act of the party which the law concedes to any person injured, and he may proceed

The People v. Toynbee.

to the removal and destruction of the nuisance without the process or judgment of any court. (3 *Black. Com.*, 5.) So that if this clause is to have any effect, it can be none other than to invite and justify depredations upon the proscribed article. These provisions are vindictive. They are novel and unusual. If we except some few states of the confederacy, who have recently entered upon a similar course of legislation, they have never before found a place in the written code of a civilized country. They are designed to work a forfeiture of goods, a deprivation of liberty and property by means unknown to the common law. They set aside the just and humane rules of evidence, approved by time and sanctioned by sound philosophy. They assume a delivery to be a sale, and proof of a sale sufficient to sustain an averment of unlawful sale. And they refuse to notice or hear a citizen in defence of his own property, unless he first submit to take the oath demanded by the act, and disclose the facts upon which he relies to establish his innocence. It awakens strange emotions in this age of progress and improvement, to behold enactments like these embodied amongst the written laws of a people distinguished for their moderation, their moral excellence, their love of justice, and their ready perception of the distinction between right and wrong, a people of Anglo-Saxon lineage, versed in the jurisprudence of Coke and Blackstone, and Kent and Story, and who are proud to trace the fundamental principles of their government upward, through the revolutionary struggles of 1776 and 1688, the conflicts and trials of the Great Rebellion, back to the Conferences of the Barons at Runnymede. Impressed by the novel and extraordinary features of the act and the doubts suggested by its perusal, I turn to the organic law as the true test of legislative power, and regardless for the time of the subordinate questions involved in the controversy, proceed to inquire whether its provisions do not fall within the prohibitions of the constitution. I shall assume for all the purposes of this argument, that the prohibitions of the act extend as well to liquors which are the growth and manufacture of foreign countries, as to those which are of domestic origin.

The People v. Toynbee.

Indeed, if we look at its title, to which resort may be had to remove ambiguities when the intention of the lawgiver is not plain, and read the closing sentence of section one, which is thought to exclude foreign liquors in connection with that part of section twenty-two which declares that it shall not be construed "to prevent the importer of foreign liquor from keeping or selling the same to any person authorized by the act to sell such liquors," the intention of the legislature to include both kinds, can hardly admit of a doubt. The exception upon which the uncertainty arises proceeded, doubtless, from a desire that the law should conform to the decision in *Brown v. The State of Maryland*, referred to hereafter. And the obscurity and want of precision in the language employed must, upon the usual rules of construction, yield to the intention, when that can be ascertained from an examination of the law itself.

In neither of the cases under consideration, were the defendants impleaded or brought to trial upon the indictment of a grand jury. Indeed, the law contemplates no preliminary inquiry by the grand inquest. The counsel for the defendants insist, that in this respect it is in conflict with that part of section six of article first of the constitution which declares that "no person shall be held to answer for a capital or otherwise infamous crime, (except, &c.) unless on presentment or indictment of a grand jury." This involves an inquiry into the character of the crime created by the act. Is it an infamous crime? Offences which rendered the perpetrator infamous at the common law, were treason, felony, and the *crimen falsi*. It is not easy to define the meaning and extent of the latter term with certainty. It not only involved falsehood, but offences which injuriously affected the administration of justice. It was the infamy of the crime, and not the nature of the punishment, which constituted the *crimen falsi*. Thus a conviction for libel, or for seditious words, or for keeping a gaming-house, did not render a man infamous. (*Wharton's Crim. Law*, 354; 1 *Rus. on Crimes*, 45; 1 *Phil. Evid.*, 28; *Barker v. The People*, 20 *Johns. Rep.*, 457; *Peake's Ev.*, 126.) The present constitution was adopted in 1846. At that time the term infa-

The People v. Toynbee.

mous crime was and still is defined, in the 2d volume of the Revised Statutes, 587, section 31, to include every offence punishable with death or by imprisonment in the state prison, and no other. Such is also the statutory definition of felony. The framers of the constitution must have understood and intended that others should understand the term in the legal sense then given to it. And it does not embrace the offence created by the act under consideration. It is not, therefore, a valid objection, that the defendants were impleaded and put upon their trial without the indictment of the grand jury.

We have already seen that the object of the law is prohibition. For general and ordinary uses; for all but a few special purposes, liquors having intoxicating properties are to be banished from society, and neither bought nor sold. The trades and employments connected with their importation, manufacture and distribution, are to be suspended or put down, and the interests which supply such trades and employments with capital, raw material, labor and means of transport, are to find other fields of enterprise, or be put down with them. This brings me to consider the principal question discussed upon the argument, which is this: Does the legitimate authority of the legislature extend to the enactment of laws prohibitory of the common and ordinary use of property? Can this department of the government, in the execution of the trusts confided in it, declare by statute an article or thing, the product of human industry or the creation of human skill, long recognized as property, and of all but universal use, and perfectly inoffensive in itself, to be a public nuisance, and thus authorize and justify its destruction? It is worth while, before we proceed further, to inquire what the proscribed article or thing is, to consider its qualities and uses, and whether it is invested with the attributes of property, so as to entitle it to the protection of the constitution.

The taste for intoxicating drinks is thought to be an instinct of our nature, an operation of the principle of organized life, and not an artificial appetite or desire peculiar to races or tribes, and induced by habit, or climate, or other external in-

The People v. Toynbee.

fluences. History and tradition corroborate the results of chemical and physiological investigation. With the earliest Hebrews, the most ancient Egyptians; with the refined and intellectual Greeks, and the robust and resolute Romans, wine was the favorite beverage, if not a part of the customary food. Among the nations whose empires were upon the shores of the Mediterranean and its adjacent seas, long before the Christian era, the fruit of the vine and the olive, together with the cereal grains, were the staple products of agriculture and the principal articles of trade and commerce. "Savage and civilized tribes, near and remote; the houseless barbarian wanderer, the settled peasant, and the skilled citizen, all have found, without intercommunication, through some common and instinctive process, the art of preparing fermented drinks, and of procuring for themselves the enjoyments and miseries of intoxication. The juice of the cocoa-nut tree yields its toddy wherever this valuable plant can be made to grow. Another palm affords a fermented wine on the Andean slopes of Chili; the sugar palm intoxicates in the Indian Archipelago and among the Molluccas and Philippines; while the best palm wine of all is prepared from the sap of the oil-palms of the African coast. In Mexico, the American aloe gave its much loved *pulque*, and probably also its ardent brandy, long before Cortez invaded the ancient monarchy of the Aztecs. Fruits supply the cider, the perry and the wine of many civilized regions; barley and the cereal grains, the beer and brandy of others; while the milk of their breeding mares supplies at will to the wandering Tartar, either a mild, exhilarating drink, or an ardently intoxicating spirit. And to our wonder at the wide prevalence of this taste, and our surprise at the success with which in so many different ways mankind has been able to gratify it, the chemist adds a new wonder and surprise, when he tells us that, as in the case of his food, so in preparing his intoxicating drinks, man has everywhere come to the same result. His fermented liquors, wherever and from whatever substances prepared, all contain the same exciting alcohol, producing everywhere, upon every human being, the same

The People *v.* Toynbee.

exhilarating effects." The wines of France, Italy and Spain, the beer of the German states and the ale and porter of the British islands, enter largely into the domestic consumption of the inhabitants of those countries, as a part of their daily food. With our own citizens, the use of fermented liquors, in some form or other, is all but universal. Either as a beverage or in the preparation of their food, few families are entirely without it. Should these facts suggest the probable result of a movement to quench an appetite so prevalent and so deeply seated by interdicting the use of the means which a wise and beneficent Providence has everywhere furnished for its gratification, they also show that whenever and wherever man rises above the savage condition, and begins to exhibit the rudiments of civilization, intoxicating drinks, and the fruits and plants and grains from which they are expressed or extracted, are among the first things which he separates from the common stores of nature, appropriates to individual use, and impresses with the character and attributes of property. Chemical and physiological science must determine whether alcohol, the essential element of intoxicating liquors, is food for the invigoration, or poison for the destruction, of the human system. The law is only concerned to know whether they fall within the catalogue of things which it recognizes as property. I find no definition of property that does not apply to intoxicating liquor. It has been separated from the common stock of nature for private use. It is that over which man may exercise absolute dominion, to the exclusion of every other person. By many it is regarded as an article of diet; by all, as one of trade. It is bought and sold, lost and acquired, like other property. The law in question treats it as property — authorizes its sale under certain limitations and for certain prescribed uses. And when it speaks of its forfeiture, it means a forfeiture of the right of property. In every sense of the term, it is property, endowed with the same rights and subject to the same measure of control, as other property, and no more.

The learned counsel for the people, in the case against

The People v. Toynbee.

Toynbee, insists that the legislative department of the state, being founded upon the model of the English Parliament, has power to declare and limit the uses to which property may be applied, and when it shall cease to be property. This power, he argues, results, 1. From the express grant of the constitution; 2. From the general illimitable nature of legislative power required for the ends of society; 3. From being coextensive with the law-making power in a democracy; and, 4. From the fact that discretion, legislative and judicial, is in its nature exclusive and subject to no control. This, doubtless, is a true exposition of the power of the parliament of Great Britain, which is said to be "so transcendent and absolute that it can not be confined, either for causes or persons, within any bounds." So thought Lord Coke, (4 *Inst.*, 36, and *Black. 1st vol. Com.*, 140.) Such also is the opinion of Chancellor Kent, (1 *vol. Com.*, 448) in his remarks upon Coke's expression in *Bonham's case*, and upon that of Lord Hobert, in *Day v. Savage*, and of Lord Holt, in *The City of London v. Wood*. Names, eminent as jurists and statesmen, are not wanting, who maintain that there are limitations upon legislative power not written in the constitution, which are implied from the nature of popular sovereignty and representative government. I decline to enter that field of inquiry, because for present purposes, and indeed for any purpose designed to secure property and liberty and life from aggression and misrule, the written limitations will be found amply sufficient, if expounded and applied in a liberal and resolute spirit. They come down to us from *Magna Charta*, and are sanctioned and approved by the wisdom and experience of near seven hundred years, and under our system are intended to save absolute inherent rights from the force of legislative acts which interrupt their enjoyment or impair their value. Among the absolute inherent rights of persons, Mr. Blackstone (*Com.*, vol. 1, 138,) enumerates the right of property, which "consists (he says,) in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. And by a variety of ancient statutes it is enacted that no man's lands

The People v. Toynbee.

or goods shall be seized into the king's hands against the great charter and the law of the land; and that no man shall be disinherited nor put out of his franchises or freehold, unless he be duly brought to answer and be forejudged by course of law." The words "by the laws of the land," and "by course of law," here referred to; and the words "due process of law," found in the sixth section of the first article of the constitution, are synonymous, and have the same legal import and effect. We shall presently see what this is. England has no written constitution, and therefore parliament is said to be so transcendent in its authority. The provisions of the great charter and the acts of later times, for the protection of life, liberty and property, are statutory regulations, which parliament may repeal or modify at pleasure. They are limitations upon the power of the crown, and not upon that of parliament. The masses in Great Britain have never yet attained to the consequence and dignity of a conquest for their absolute inherent rights, except through the legislative and the judicial branches. It is a historical truth, that the struggle there has constantly been to put the real or pretended prerogatives of the crown under restraint, sometimes by the barons as in the time of the great charter; sometimes by the judges, as in the time of Lord Coke; and sometimes by the parliament, and especially the house of commons, as in the times of the great rebellion, and the act for the settlement of the succession in 1688. We have incorporated the prohibitions of the English statutes for the protection of life, liberty and property into our constitution, not as limitations upon executive authority, but as limitations upon legislative power. The same unrestrained dominion over property which the parliament and people of Great Britain have denied to the crown and reserved to parliament, the people of the state of New York have denied to the legislature and reserved to themselves.

The latter clause of section six of the first article of the constitution is in these words: "No person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled, in any criminal cause, to be a witness against him-

The People v. Toynbee.

self; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." These provisions are not to be narrowed down by a literal construction. They are to be largely and liberally expounded. Their object is to secure the enjoyment of the rights to which they refer, and must have an interpretation which will effect that object. The terms "life," "liberty," "property," and "due process of law," as they stand in the section, become of vital consequence in giving it a construction. To be of any real value they must have a fixed, permanent signification, one that shall remain unchanged by circumstances, or time, or the caprice of those to whom the restraining words of the section may become offensive or troublesome. The legislature may declare what a particular term or expression means when used in a statute. This is a customary and unexceptionable act. But it can not declare what the same term or expression means, and thus enlarge or restrain its signification when used in the constitution. It is of no consequence what the legislature think of it, or what import they attribute to it. The real inquiry is, what did the framers of the constitution mean by it? and what was its known legal definition and signification when the constitution was adopted? The word "property" must comprehend now whatever it comprehended in 1846. Any other rule would place at the absolute disposal of the legislature every right intended to be secured and consecrated by the limitations I have quoted. The right of property, as we have seen, consists in the "free use, enjoyment and disposal." Its incidents are the enjoyment, use and the power of disposition. How are we to designate, classify or define an interest or an estate which can not be used, enjoyed or sold and transferred? By what words and expressions shall we impart to others our idea of its nature and qualities? There can be no property, in the legal and popular sense of the term, where neither the owner, or the person who represents the owner, has the power of the sale and disposition. That which can not be used, enjoyed or sold, is not property; and to take away all or any of these incidents,

The People v. Toynbee.

is in effect to deprive the owner of his right of property. This is precisely what the act "for the prevention of intemperance, pauperism and crime," is intended to accomplish, and precisely what it will accomplish if it can be enforced, for it declares that the subject to which it refers shall neither be sold, or kept for sale or with an intent to be sold. The statutes may, and it is their office to, prescribe the forms by which sales may be effected; that the title to real property shall only pass by deed acknowledged before an officer, or attested by a witness; that personal estate shall only pass by delivery in writing or the payment of purchase money; that poisonous drugs, when sold, shall be so labeled. They may also declare, that intoxicating liquors shall not be sold to minors, paupers, or habitual drunkards, or to be drank in the house of the seller, or by retail to be taken out of the house, unless he have a license and be of good moral character, &c. These are mere acts of regulation and conservation, and do not in the least impair the right of property.

There is another right incidental to the right of property which, when abrogated or suspended, tends to the deprivation of property. That is, the right of action, the right to the protection of the laws, and to redress by the legal tribunals. The forms of action and of legal proceedings, the mode by which civil injuries are redressed and rights asserted and defended in the courts, are classed as remedies, and are doubtless subject generally to legislative supervision and control. But when the law-making power comes to deal with the absolute inherent rights referred to in the 6th section of the first article of the constitution, forms and modes of proceeding from being mere remedies rise to the dignity of rights which can not be denied or withheld. The principle is asserted by Mr. Justice Washington, in *Green v. Biddle*, (8 *Wheaton Rep.* 1, 75,) in the following language: "Nothing can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy, &c., or which clogs his recovery of possession by conditions and restrictions tending to diminish the amount and value of the thing recovered, impairs his right

The People v. Toynbee.

to and interest in the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure according to the nature and the extent of such restrictions." Blackstone, in his Commentaries (*vol. 1, p. 55,*) says; "The remedial part of a law is so necessary a consequence of the two former (the declaratory and directory parts,) that laws must be very vague and imperfect without it. For, in vain would rights be declared, in vain directed to be observed, if there were no method of recovering or asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law." Mr. Justice Taney, in delivering his judgment in *Bronson v. Kinzie*, (1 *Howard's Rep.* 311,) and applying this principle to laws which impair the obligation of contracts, says: "Although a new remedy may be deemed less convenient than an old one, and may, in some degree, render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract; but if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." In *Holmes v. Lansing*, (3 *John. Cases*, 75,) Chancellor Kent, speaking the judgment of this court, says: "so long as contracts were submitted without legislative interference to the *ordinary and regular course of justice*, and existing remedies were preserved in substance and with integrity," the constitution was not violated. And judge Denio, in pronouncing the judgment of the Court of Appeals, in *Morse agt. Gould*, (1 *Kernan*, 281,) also says: "It is admitted that a contract may be virtually impaired by a law which, without acting directly upon its terms, destroys the remedy, or so embarrasses it that the rights of the creditor under the legal remedies when the contract was

The People v. Toynbee.

made are substantially defeated." With this necessary qualification, the jurisdiction of the states over the legal proceedings of the courts is supreme. These authorities sufficiently indicate the distinction between rights and the remedial process of the law for their vindication when wrongfully withheld or invaded, and they also define and mark the utmost verge and limit of legislative power when applying remedies to absolute inherent rights which the people have reserved to themselves by the limitations of the constitution. This right of action to redress and protection, by the venders and owners of intoxicating liquors, is seriously impaired—if not in effect destroyed—by the conditions imposed by the latter clause of the 16th section of the act in question.

Those provisions of this act which I have endeavored to show tend to the deprivation of property, can not, by any process of reasoning, be brought within the meaning of the terms, "by the laws of the land," and "by course of law," used in the English Statutes, or the "due process of law," of the 6th section of article 1, of the constitution. Lord Coke says, that the words "by the law of the land," mean by the course and process of law "by indictment or presentment of good and lawful men, where such deeds be done in due manner or by original writ of the common law." "The law of the land, in bills of rights, does not mean merely an act of the legislature, for that would abrogate all restraints upon legislative authority. The clause means, that the statute which deprives a citizen of the rights of person and property without a regular trial according to the course and usage of the common law, would not be the law of the land in the sense of the constitution." *Hoke v. Henderson*, (4 Dev. 1.) "The words "due process of law," in this place, can not mean less than a prosecution or suit instituted and conducted according to the forms and solemnities for ascertaining guilt or determining the title to property. It will be seen that the same measure of protection against legislative encroachments is extended to life, liberty and property, and if the latter can be taken without a forensic trial and judgment then there is no security for the others. If the legislature can

The People v. Toynbee.

take the property of A and transfer it to B, they can take A himself and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation. There must be due process of law." This expressive language of Mr. Justice Bronson, in *Taylor v. Porter*, (4 Hill, 140,) has often been quoted and can not be too often repeated. It should be engraven upon the walls of the legislative chambers as a perpetual memorial that there are bounds to legislative authority. Vide, also, the opinions of Judge Denio and of the late Mr. Justice Edwards in *Westervelt v. Gregg*, (2 Kernan, 202.) "The prescribed forms and solemnities for ascertaining guilt, or determining the title to property," comprehend as well the forms of procedure as the legal presumptions and rules of evidence by which the guilt is to be ascertained or the title determined. These presumptions and rules are also a part of the remedial process of the law, and their alteration and modification is doubtless, to a certain extent, within the power of the legislature; but in cases which affect the personal rights secured by the constitution, the changes must leave the right unimpaired and place no material impediments or obstructions in the way of those who are concerned in asserting it. In trials for crimes, and to enforce penal statutes, the presumption of innocence obtains until it is disproved, in all cases, and in trials to redress civil injuries and enforce civil rights, the presumption of title and right is with the defendant until it otherwise appears, unless in his pleadings he voluntarily assumes the *onus probandi*. In proceedings which aim at the deprivation of liberty and property by fines and forfeitures and the pains of imprisonment, that is not due process of law which reverses the wholesome and humane rules of the common law and substitutes the presumption of wrong and guilt for that of right and innocence. In this respect the provisions of section 17 of the act are highly offensive.

Nor can the force and efficiency of the constitutional limitations be evaded or averted by the declaration of the 25th section of the act, that intoxicating liquors are a public nuisance. In the words of Chief Justice Ruffin, "such a

construction would abrogate all restrictions on legislative authority." If a class of citizens can be deprived of a particular kind of property by a legislative declaration that it is a public nuisance, then another class may be deprived of liberty by a legislative act proscribing them as malefactors and felons. Grant this power to the legislature, and the limitations of the constitution are no longer of any value. Every kind of property may be put without the pale of the laws and the protection of the courts, and exposed to seizure and forfeiture by a simple act declaring the proscribed article to be a public nuisance. The existence of such a power is inconsistent with the theory of a limited representative government, because it is destructive of the ends which such government is designed to accomplish. The 25th section proceeds upon a misapprehension of what a nuisance is. Common or public nuisances are offences "against the public order or economical regimen of the state, being either the doing of a thing to the annoyance of the king's subjects, or the neglecting to do a thing which the common good requires." (4 *Black. Com.* 166.) Impediments and obstructions placed in highways and navigable streams are nuisances *per se*, because they interrupt the passage and thereby annoy others. Trades and manufactures of certain kinds become nuisances from the places where and the manner in which they are conducted. Animals, such as dogs, swine, &c., are not nuisances until they become offensive by being suffered to run at large or kept in the vicinity of men's habitations. So an accumulation of vegetables and fruits in process of decay, the flesh and offal of animals, gun powder, drains and sewers in cities and populous places, may or may not become public nuisances by their localities and other attendant circumstances. The true test is, that the thing, trade or business is in some way detrimental to the public, for the elementary writers say, "common nuisances are such inconvenient or troublesome offences as annoy the whole community in general, and not some particular person." Common nuisances may be abated or removed by the party annoyed or injured

The People v. Toynbee.

who is not required to wait for the slow progress of the ordinary forms of justice. Liquors that intoxicate exhibit none of the qualities which constitute a common nuisance. They obstruct no navigable rivers, and impede the passage of no public highways. They create no noise to disturb the public tranquility and peace. They exhale no offensive odors to taint the air and impair the public health. Nor do they endanger the security of persons or of other property by a tendency to ignition and explosion. In the stores of the importer, the vaults of the brewer and in the cellars of the wine grower and consumer, they are as harmless as the wood or glass in which they are enclosed. He who knows how to enjoy them with reason and moderation, or has the moral courage and self-denial to let them alone, may consider himself free from annoyance and danger. They may be, and doubtless are, converted to base uses—uses which produce “intemperance, pauperism and crime,” and, I may add, moral degradation and grief, and anguish unspeakable. And then the places where they are thus used and those concerned in prostituting them to such uses, fall clearly within the province of legislative regulation and control, and the maxim: *Sic utere tuo ut alienum non lædas*, applies in all its force. But intoxicating liquor can not be deprived of the defences with which the constitution surrounds the property of the citizen by an act proscribing it as a public nuisance.

There are some observations of Justices Taney and Woodbury, in the opinions delivered by them in the cases against the states of Massachusetts, Rhode Island and New Hampshire, (5 *Howard*, 504,) which are thought to favor the idea that the states may pass laws prohibitory of the uses and sales of ardent spirits, subject to the right of importation and of sale by the importer. Those who attach any value to expressions which are *obiter dicta* and not necessary to the decision of the precise question under examination, will do well to remember that the language referred to asserts the absence of any thing in the constitution of the United States which forbids the passage of prohibitory laws, and nothing more. The cases in which the

The People v. Toynbee.

observations occur determined that the excise laws of the several states named in the proceedings did not conflict with the authority given to congress to regulate commerce with foreign countries and among the several states, and nothing else. The power of a state exercising its sovereign authority, is that to which these learned judges refer; but the power of a state legislature, exercising its authority under such restraints and limitations as its constituents may have imposed upon it, is quite a different thing, and one which they did not consider. The question here is not what the legislature might do were these limitations removed or modified, nor what the people of the state might do by an amendment of the organic law, but what the legislature may now do with the limitations in full force.

A distinction has also been suggested between the power of the legislature over property in liquors acquired and existing at the time the act took effect, and property in liquors acquired afterward. The act itself recognizes no such distinction, and does not discriminate between present and future acquisitions, but applies its penalties, forfeitures and disabilities with unsparing rigor to those who now own and to those who may hereafter own such property. In this respect I think it entirely consistent with itself, for a constitutional security which does not cover future as well as present acquisitions is of no practical value, and will afford no sort of guaranty against intentional or mistaken aggression. Here are a class of citizens who have invested their property and spent the best years of their lives in learning and establishing a particular business or trade, inoffensive and commendable in itself—the growth and manufacture, it may be, of wine, the culture of barley and hops, the manufacture of firearms and gunpowder, the fabrication of types, printing presses and paper, and then comes a legislative act, confessing its incompetency to invade or disturb existing interests, and declares that because wine and the decoction of barley and hops may lead to intoxication, firearms and gunpowder to war, bloodshed and the destruction of human life; and types, printing presses and paper to blasphemous, libelous and obscene publications, all future acquisitions of the

The People v. Toynbee.

kind shall cease to be regarded as property, and be no longer entitled to claim the benefit and protection of the laws. Let this fancied distinction between present and future acquisitions once obtain, and property will not hereafter depend for its security upon a permanent rule of constitutional law, but upon legislative moderation and forbearance, and such limitations as legislative wisdom and discretion may put upon its own authority. But let us look upon this distinction in another aspect. *Brown v. The State of Maryland*, (12 Wheaton, 419,) decides that a state law requiring importers of foreign goods, (including liquors) to take out a license, before proceeding to sell by the bale or package, is repugnant to the constitution of the United States and void. In other words, that a state has no power to prohibit sales of foreign goods by the importer in the bale or package in which they were imported. It was argued, in behalf of the state, that whenever the goods entered its jurisdiction, the power of congress ceased and that of the state was substituted in its place. Chief Justice Marshall answered the argument in this wise: "Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms with the intent that its efficiency should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importations be given unaccompanied with the power to authorize a sale of the thing imported. Sale is the object of importation and is one essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the entire thing, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell." Here, then, is a positive affirmation that the right to sell, by the importer, is a component part of the power to regulate commerce, and that congress may, in disregard of state legislation, authorize the importer to sell. Now, the right to sell by the importer implies the right to purchase by some other

The People v. Toynbee.

person, because there can be no sale if there is no person to purchase. Had the state of Maryland, in place of prohibiting sales by the importer gone farther and prohibited purchases from the importer by its own citizens, can there be a doubt that such a prohibition to purchase would have been held equally void as the prohibition to sell, and equally hostile to this exclusive right of congress to regulate commerce? When, therefore, a citizen of the state of New York becomes the purchaser of foreign liquor from the importer, he acquires a right of property under the paramount law of the United States as sacred and secure from legislative invasion and aggression as rights of property which were vested at the time the law under consideration took effect.

If the judgment in the case of *Brown v. The State of Maryland*, and the reasoning of the chief justice, is entitled to any weight as authority, it is decisive of the question so far as sales of foreign liquors by importers is concerned. The right of importation, we see, means the right to introduce foreign goods into the country, and to sell them to those who may choose to become purchasers. If state legislation can substantially take away from the mass of its citizens the power to become purchasers, a state can in effect impede foreign trade and put an end to foreign importations. It has only to declare, what the act under examination declares, that the importer shall only sell in the original packages, to such persons as the state may license and authorize to become purchasers. Sale is no longer incidental to importation. The importer's right to dispose of his goods in the market no longer depends upon the authority given to congress to regulate commerce and intercourse with foreign countries. But it depends also upon the disposition of the states to suffer their citizens to become purchasers of foreign commodities. I am unable to perceive any difference between state resistance to foreign importations by interdicting sales by and purchases from the importer, and resistance by a preventive force stationed upon its own borders. Either mode is an unwarrantable interference with a subject of legislation over which congress has exclusive control and dominion.

The People v. Toynbee.

The laws which prohibit intermural interments, referred to upon the argument, stand upon the intelligible and constitutional ground of police regulations to prevent nuisances. (*Coats v. The Mayor, &c. of New York*, 7 Wendell, 585.) And the statutes which authorize the destruction of buildings to arrest the progress of fire or the ravages of pestilence, are justified by the law of overruling necessity, and is the exercise of a natural right to avert a great public calamity. (2 *Kent's Com.* 338; *Russell v. The Mayor of New York*, 2 Denio, 461.)

I therefore arrive at the conclusion, that so much of the 1st section of the act under consideration as declares that intoxicating liquor shall not be sold, or kept for sale, or with intent to be sold, except by the persons and for the special uses mentioned in the act; so much of sections 6, 7, 10 and 12, as provide for its seizure, forfeiture and destruction; so much of the 16th section as declares that no person shall maintain an action to recover the value of any liquor sold or kept by him which shall be purchased, taken, detained or injured, unless he prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him; so much of section 17 as declares that upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale; and so much of section 25 as declares that intoxicating liquor, kept in violation of any of the provisions of the act, shall be deemed to be a public nuisance, are repugnant to the provisions of the constitution for the protection of liberty and property, and absolutely void.

The proceedings in both cases should be reversed and set aside, and Philip Berberick is discharged from his arrest.

S. B. STRONG, J.—This cause comes before us on an appeal by the defendant from a judgment rendered against him by a police justice of the city of Brooklyn, for the alleged violation of the statute for the “prevention of intemperance, pauperism and crime,” commonly called the prohibitory act. The complaint was preferred before the justice by a policeman, pursuant

The People v. Toynbee.

to the 12th section of the statute. It stated, in substance, that on the 17th of July, 1855, the defendant sold, and kept for sale, and had in his possession with intent to sell, in Montague street, in the third ward of said city, intoxicating liquor, to wit, brandy and champagne, in violation of the said statute; and that said offence consisted in selling one glass of brandy, and one bottle of champagne. When the defendant was brought before the justice, his counsel moved that he should be discharged, on the grounds that it did not appear by the complaint that any crime or offence whatever had been committed; and that the act under which the prosecution had been instituted is unconstitutional and void. The motion was denied. The defendant then said that he did not request to be tried by a court of Special Sessions, but that he objected thereto, and offered to give bail to appear at the next court having criminal jurisdiction. The justice overruled the objection, declined to receive such bail, and required the defendant to plead to the charge.

The defendant thereupon pleaded not guilty. A trial was immediately had before the justice, without a jury; the defendant was convicted, and sentenced to pay a fine of fifty dollars and the costs; and it was adjudged that the intoxicating liquor should be forfeited. The defendant's counsel objected before the justice that the complaint was defective, because it did not aver that the liquors alleged to have been sold were not liquors, the right to sell which in this state is given by any law or treaty of the United States. If such an averment was necessary, the justice should have dismissed the complaint by reason of the omission. The statute does not direct what the complaint shall contain, and that is, of course, left to the rules of the common law.

The complaint is a substitute for an indictment, so far as it relates to substance, and requires, at least, as much particularity; indeed, the authorities say more. Mr. Chitty, in his approved work on criminal law, (*vol. 1, p. 281-2*), says: "It is a general rule that all indictments, upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offence in the act, so as to bring the de-

The People v. Toynbee.

fendant *precisely* within it." "And," he adds, "not even the fullest description of the offence, were it even in the terms of a legal definition, would be sufficient without keeping close to the impressions of the statute." In the case of the *People v. Allen*, (5 Denio, 79,) Beardsley, C. J., says "an indictment upon a statute must state all such facts and circumstances as constitute the statute offence, so as to bring the party indicted precisely within the provisions of the statute. If the statute is confined to certain classes of persons, or to acts done at some particular time or place, the indictment must show that the party indicted, and the time and place" where and "when the criminal acts were perpetrated, were such as to bring the supposed offence directly within the statute." There can be no doubt as to the principle; it is reasonable and proper, and is not controverted by any respectable authority. The first section of the statute under consideration enacts that intoxicating liquors, except as thereafter provided, shall not be sold or kept for sale, or with intent to be sold, by any person for himself or any other person, in any place whatsoever. Those expressions are certainly very broad and comprehensive, and they are not so restricted by their reference to subsequent exceptions, as to make any negation of such as are included in other sections a necessary part of the description of any alleged prohibition. (*Popham*, 93-4; *Hawkins*, b. 2, ch. 25, s. 113.) The last clause of the first section, however, declares expressly that the *section itself shall not app'ly* to liquor, the right to sell which in this state is given by any law or treaty of the United States. The statute does not forbid the sale of all intoxicating liquors. A large class certainly is exempt from the prohibition. It is not necessary that I should consider, in discussing this point, how far the qualification extends, but it is material to the decision of another point involved in this case, and I may as well express my opinion about it here.

The question which has been agitated upon this point is, whether the exception refers to foreign liquors only while in the hands of the importers, and contained in the original cask or vessel, when, according to the decisions of the Supreme

The People v. Toynbee.

Court of the United States, the right of sale is given by congressional legislation, or to such liquors at all times and in whatever condition they may be—in other words, whether it refers to the liquors *themselves* or to their *status*. It must be admitted that the language is susceptible (and I think equally susceptible) of either interpretation. In these cases, the rules of construction are different, according to the character of the statutes—whether they are purely remedial or penal. The former is entitled to a liberal, while the latter is confined to a strict construction. A statute is purely remedial when it furnishes additional means of redress to an existing wrong. In criminal cases it applies to something that is already *malum in se* or *malum prohibitum*. It is then creative of the remedy only. As all are in favor of the due punishment of acknowledged crime, we readily admit that statutes designed for that purpose are entitled to a favorable construction. But it is otherwise when the statute creates a new offence. It is then an innovation, often an encroachment upon previous rights, and its correctness or justice is not always conceded, or generally admitted. The rule is, therefore, very properly, that such a statute should be construed strictly; that nothing should be deemed a crime under it but what is clearly and unequivocally defined. No man should be punished for an act (previously lawful) under a new statute, unless it clearly announces to him, beyond any reasonable doubt, that it is criminal. Now the statute under consideration is creating a new offence. True, it was a misdemeanor before, to sell strong or spirituous liquors or wines in quantities less than five gallons without a license. But the offence under the Revised Statutes was only a part of what was rendered a crime under the prohibitory act, and as the latter is integral, it is in effect new, and must be so considered. Applying the principle of construction I have endeavored to illustrate to the qualifying clause of the first section, and taking that by itself, the prohibition would not extend to imported liquors at all. But there is another rule in giving a construction to an expression in a statute equally indicative of two varied meanings, and that is,

The People v. Toynbee.

that the whole enactment must be considered, and if one of the interpretations is consonant to the other provisions and the main scope and design of the act, and the other not, that which is consistent shall prevail. It is not then a question of strict or liberal construction, but the preponderance produces reasonable certainty. Now, no one who reads the act in question, and considers its object, can hesitate a moment in coming to the conclusion that the legislature intended to prohibit mainly the sale of imported liquors as a beverage. Indeed, the statute would be wholly ineffectual if it did not go to that extent. Instead of being an extension it would be a relaxation of the old system. I think, therefore, that the true way of reading the first section, is as a *prohibition of the sale of intoxicating liquors, not vendible beyond state legislation, in their existing condition, according to the decisions of the Supreme Court of the United States*. But to whatever extent the vendible liquors may go, their express exemption qualifies the description of those included in the prohibition. Men may still sell intoxicating liquors, all that is charged in the complaint, and yet not be guilty of any offence. It is undoubtedly true that when a statute contains provisos and exceptions, in distinct clauses, it is not necessary to state in an indictment that the defendant does not come within the exception, or negative the provisos it contains. The reason given is, that these are matters of defence, which it is necessary that the accused should aver and prove. But that principle does not apply where, as in this case, the enacting section declares that it is inapplicable to the excepted matters. The statute does not, then, constitute them the subjects of offence; and it is not necessary for the accused to aver or prove any defence until there is proof that he is guilty of what is condemned. In the case of *Rex v. Jarvis*, cited in a note to *Rex v. Stone*, (1 *East*. 639,) Lord Mansfield said that where exceptions are in the enacting part of the law, it must appear *in the charge* that the defendant does not fall within any of them. And Foster, J., who was an eminent criminal lawyer, remarked that "where negatives are descriptive of the offence, then they must be set forth."

The People v. Toynbee.

The rules which I have stated are applicable to indictments which are preferred by a grand jury, and where the accused may have the benefit of a fair and deliberate trial by jury. But a greater degree of strictness is required in summary proceedings before an inferior jurisdiction, which does not afford to the defendants those advantages that the common course of law allows them. In such cases Mr. Chitty says, (vol. 1, p. 284,) it is necessary to show by negative averments that the defendants are not within any of the provisos or exceptions of the statute. It does not cure the difficulty that the defendant is charged with having sold liquors contrary to the form of the statute. That will not aid a defective description of the offence. Nor can the defect be cured by evidence. The evidence must be confined to the charge, and the accused can not be required to answer any complaint except that which sets out an offence conformably to the rules of law. My conclusion upon this point is, that the complaint was radically defective, and that a conviction upon it can not stand.

The next objection to the proceeding before the justice is, that by refusing the defendant's tender of bail for his appearance at the next court having criminal jurisdiction, there was in effect denied to him the constitutional right to be tried by a competent jury. The result of the denial was, that if the defendant had been tried by a jury it must necessarily have been before one consisting of six persons, out of twelve to be summoned by the constable.

The jurors for our courts of Special Sessions are generally taken from the immediate neighborhood, and are liable to be influenced; and their verdict is sometimes controlled by the bias created by a public accusation for the commission of a crime in their own vicinity. They are ordinarily selected too by an officer who has had an agency in the preliminary steps against the accused, and who, as is sometimes the case with police officers, may be anxious to procure his conviction. Whereas, the jurors of our higher courts of criminal jurisdiction are designated by responsible town officers; their names are deposited in a box kept by the county clerk, and are drawn by him in the

The People v. Toynbee.

presence of some of the county officers, and they are taken from the whole county. These measures are taken for the purpose of having intelligent and impartial jurors, and they are generally effectual. Besides, it is a matter of some importance to the accused whether his character, his liberty and his property are made dependent upon the verdict of twelve or six men. Innocent men have sometimes escaped from the worst of punishment by the voice of a single juror; and in such cases the larger number of course affords the greater protection. It is true, too, that the chance of escape of the guilty is increased by the same means. But in the administration of justice it is at least as essential to protect the innocent as to punish the guilty. The right claimed by the defendant is an important one, and if his claim was well founded, the subsequent proceedings should not have been had, and the judgment resulting from them against the accused was void.

On looking over the entire statute, it seems to me that the provisions relative to the trials under it indicate an intent to confine them to the Special Sessions. The magistrate who issues the original process constitutes the court; they are identical. The fifth section provides that such court shall not be required to take the examination of the accused, but *shall* proceed to trial as soon as the complainant can be notified. The provisions of the act relative to appeals apply exclusively to judgments in the courts of Special Sessions, and are mostly inapplicable to trials before the General Sessions, or Oyer and Terminer. Many of them are very important. The right of appeal is given to the complainant as well as the defendant. If the defendant appeals, he is required to give a satisfactory bond that he will not, during the pendency of the appeal, violate any of the provisions of the statute. The ordinary power of amendment of the appellate court is considerably increased, and any judgment or verdict against evidence may be reversed on appeal, as, (in the words of the statute) "in civil actions." It is not material to inquire here whether verdicts against evidence in civil actions can be reversed on appeal. I am considering the provision simply as indicative of the inten-

The People v. Toynbee.

tion of the legislature. Now if it was designed by constituting offences under the act, misdemeanors, to confer the right to try the accused in the courts of General Sessions and Oyer and Terminer, the legislature would, I think, have made the provisions relative to appeals applicable to those courts also, otherwise their work would have been but half done. There are other provisions in the statute indicating a design that all trials under it should be had in the Special Sessions, and not any to the contrary. The rule in these cases is, that when the statute creates a new offence, and particularly describes a method of trial and a punishment adequate to the offence for its violation, the complainants, whether the public or individuals, are confined to the remedies expressly given in such statute.

. I am, therefore, inclined to agree with the justice in the conclusion to which he arrived, that so far as the statute went, he could not be required to take the proffered bail. But the more important question arises whether the (in effect) denial of the privilege claimed by the defendant is not violative of the constitutional right of trial by jury. If it be so, the enactment, so far as it relates to compulsory trials in the courts of Special Sessions, is void.

The constitution of this state, which went into operation in 1847, ordains (*art. 1, § 2*) that the trial by jury in all cases in which it has been heretofore used, should remain inviolate forever. The language is strong and evinces the importance which was justly attached to the privilege. The terms used in the constitution must be applied according to their meaning at common law, unless a different interpretation is clearly indicated. There is no evidence of any different intent in reference to this provision, nor can any be inferred. A jury, by the rules of the common law, must consist of twelve men. It was therefore very properly remarked by Johnson, J., in *Cruger v. The Hudson River Rail Road Company*, (2 Kernan's R. 198,) that the constitutional provision which I have quoted, imports a jury of twelve men, whose verdict must be unanimous. In reference to the cases to which it refers, and whether they include the subsequently created cases, I will quote from an

The People v. Toynbee.

opinion in the case of *Wood v. The City of Brooklyn*, (14 Barb. R. 432,) because it expresses my present sentiments on this subject. "This provision relates to classes and of course includes the individual cases which they comprise. In no other way can constitutional enactments preserve that continued efficacy which is so essential for the public good. Whenever, therefore, a new case is added to a class it becomes subject to its rules. A crime newly created is subject to any constitutional regulations relative to the class of crimes generally. The constitutional provision refers to usage, and that must control and define its application. It is a matter of public notoriety that accusations for crimes have generally been tried before a jury. If there have been exceptions they have not been sufficiently numerous to affect the general usage. The introduction of a new subject into a class renders it amenable to its general rules, not to its exceptions, unless there is something peculiar calling for that application. To allow the legislature to except from the operation of a constitutional provision by direct enactment a matter clearly falling within its meaning, would sanction a fraud upon the organic law, and might in the end destroy its obligation." These remarks were originally applied to penalties, but in the quotation I have substituted crimes to which they are alike applicable. The sentiments were expressed by me in 1852, and I cite them with the greater satisfaction as they have recently received the concurrence of three of my brethren. The same principle was applied by Chancellor Walworth to the crime of murder in the case of the *People v. Enoch*, decided by the court for the correction of errors. (13 Wend. 159.) In his opinion in that case he made the following remarks: "Malice was implied in many cases at the common law, where it was evident that the offenders could not have had any intention to destroy human life, merely on the ground that the homicide was committed while the person who did the act was engaged in the commission of some other felony, or in an attempt to commit some offence of that grade. This principle is still retained in the law of homicide, and it necessarily follows, from the principle itself, that as often as the legisla-

The People v. Toynbee.

ture creates new felonies or raises offences which were only misdemeanors at the common law to the grade of felony, *a new class of murder is created*—(it would probably have been more accurate to have said the previously existing class was enlarged)—“by the application of this principle to the case of a killing of a human being, by a person who is engaged in the perpetration of a newly created felony. The court and jury in such cases immediately *apply the common law principle* and the killing is adjudged to be murder or manslaughter, according to the nature and quality of the crime that the offender was perpetrating at the time the homicide was committed.” There could not be a stronger case to illustrate the rule that newly created crimes are subject to the incidents of the class into which they are introduced, without any express provision to that effect in the statute. By the terms of the prohibitory act the offence imputed to the defendant was characterized as a misdemeanor. The usage in criminal cases prevailing immediately before and at the time of the adoption of the constitution, and to which it refers, was undoubtedly conformable to the provisions of the Revised Statutes which had been in operation since 1830. (2 R. S. 711, § 2, 3.) Pursuant to those provisions persons accused of misdemeanors had the *right in all cases*, to give bail for their appearance at the next court, having criminal jurisdiction, which must be either the General Sessions or Oyer and Terminer, and in their doing so, or, what was equivalent, making an offer to that effect, which was refused, a court of Special Sessions could proceed no further. That, in effect, secured to the accused, at their option, the right to be tried by a jury of twelve men, and to be exempt from punishment except by their unanimous verdict. That right was denied to the defendant in the case under consideration. If the prohibitory act called for such a denial it contravened the constitutional ordinance and was so far void; or if it impliedly permitted the continuance of the privilege it should have been accorded to the defendant on his demand. So that *quacunque via data*, this objection is fatal to the conviction.

The only remaining question which I deem it proper to con-

The People v. Toynebee.

sider, is: Whether the act in question, so far as it purports to prohibit the sale of intoxicating liquors to be used as a beverage, is valid. The objection urged against that feature of the act is that it is an exercise of despotic power, calling for an unconstitutional interference with the *rights of property*. All civilized nations agree in asserting the rights of property, and holding them sacred, as essential to the prosperity and happiness of man. Sir William Blackstone says (2d Com. 2,) that "there is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property, or that sole and *despotic dominion* which a man claims, and exercises over the external things of the world, in *total exclusion* of the right of *any other individual* in the universe;" and Chancellor Kent well remarks (2d Com. 319,) that "the sense of property is generously bestowed on mankind for the purpose of rearing them from sloth and stimulating them to action; and so long as the right of acquisition is exercised in conformity with the social relations, and the moral obligations which spring from them, it ought to be *sacredly protected*. The natural and actual sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections." There are, undoubtedly, visionary theorists who advocate the community of property in small societies; but the general sense of mankind indicates that civilized society can not exist when the right to separate and distinct property does not prevail, or is not *sacredly protected*. The people of this state have shown their appreciation of the rights of property in their organic law by declaring (art. 1, p. 6,) that "no person shall be deprived of life, liberty or property, without due process of law." We are thus as effectually protected in the enjoyment of our property as of our own lives or our liberty. *The protection given to property as well by the sense of mankind as by positive enactment makes no distinction as to its*

The People v. Toynbee.

*greater or less utility. It extends to whatever has been held and enjoyed as such by custom and usages of the country. No power is given to any man or body of men to discriminate. We hold our property independently of the varying and sometimes capricious estimates of our fellow men. So universal has been the sentiment in favor of the right, and the determination to support it, that the act in question is, with a single exception, the only instance of an attempt to legislate any species of property substantially out of existence. The exception to which I allude, is the original abolition of slavery by statute. That institution, however, did not exist, nor were slaves considered as property at common law. If they had been, it might have been a grave question whether their owners could have been deprived even of such property without compensation. But, at any rate, that was an extraordinary case, having reference to what was generally admitted to be the original rights of man, which the statute was designed to enforce, and can not be considered as a sanction for the violation of the constitutional protection of property. The protection of any species of property must necessarily extend to its essential and definitive characteristics, especially those which constitute its main value. * * * Otherwise it might be rendered useless in the hands of the possessor, and its protection would be wholly illusory. One of the essential characteristics of property is its vendibleness, especially for the principal use to which it can be appropriated. That necessarily results from the despotic dominion over it which Blackstone ascribes to the possessor. Chancellor Kent says (2d Com. 319,) that the exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself, and for this he quotes Grotius (b. 2, ch. 6, sec. 1,) and again the same learned commentator says, (p. 320, vol. 2,) "The power of *alienation* of property is a *necessary incident to the right*, and was dictated by mutual convenience and mutual wants." This is so entirely in accordance with the general sentiment of mankind and the universal practice, that it can not be disputed; so far as my information or recollection*

The People v. Toynbee.

extends, the present is the first and only attempt to interfere with, and prevent the general right of sale of any species of property. That the manner of selling it may be regulated so long as the right is essentially preserved, there can be no doubt. It is upon this principle that our former laws regulating the sales of spirituous liquors were passed. They were, however, by no means prohibitory of the right. Every man was at liberty to sell in quantities exceeding five gallons, and a selected class in any quantity. Upon the same principle sales at auction of goods generally, sales by peddlers and sales by apothecaries of poisonous drugs have been regulated, and sales of deteriorated and unwholesome provisions have been prohibited. These were merely police regulations, and it did not interfere with the ordinary sale of any property in its appropriate condition. So, too, it is competent for the legislature to prohibit the abuse of property so as to make it peculiarly dangerous or deleterious to society. It is on this principle that laws have been passed to prevent the storing of gunpowder in cities, to regulate the construction of buildings so as to prevent unnecessary exposure of lives in crowded places, and to suppress gambling in lotteries or otherwise. In none of these instances is there any interference with the ordinary use of property. There is also a power to prevent or abate nuisances. But to that there must necessarily be a limit. It can not be extended to the general destruction of any species of property, or of its organic characteristics. If it could go thus far none would be safe. The use of animal food, tea, coffee and fruits, each of which is considered by many to be deleterious, might be prohibited. As the legislature has confessedly the power to adopt police regulations so as to prevent the abuses of property, it may be asked where are the limits to which it can be legitimately applied, and by whom are such limits to be prescribed? It may be very difficult in many cases to draw the line, but that can be no reason for claiming an unlimited power.

The right is simply one of regulation not of destruction. When an enactment is clearly destructive of a right, and not simply reformatory of its abuses, there can be no question as

The People v. Toynbee.

to its invalidity. There is no reason for claiming discretionary power in such cases. That can be invoked only in cases of doubt. It can be no sufficient reason for acting clearly wrong in any particular matter that the exact line of separation between the right and wrong can not be easily defined. Upon the whole my impression is, that the right of property extends not only to its corpus, *but to its ordinary and essential characteristics*, of which the right of sale is one, and that it can be controlled only so far as to prevent its abuse, without destroying such characteristics.

It must be conceded that an unlimited and unrestricted power to take the life, the liberty or the property of our fellow man is despotic. And it matters not whether it is lodged in the hands of one or many, or whether the depositories are elective or hereditary, the character is the same. It was contended on the argument by the counsel for the people, that the legislature of this state possesses despotic legislative power by reason of the general constitutional grant. * * * * To that I can not assent. It is undoubtedly true that absolute power exists originally in the people constituting a distinct and separate community. It is competent for them to establish for themselves a despotic government in one man, or many men, if they should choose to do so, although an intention to confer absolute power can never be inferred, and certainly not in a country claiming to be free. But the people of this state when they entered the union deprived themselves of the power of establishing any other than a republican form of government. (*Const. of the U. S. art. 4, § 4.*) There is not perhaps any very accurate description of a republican form of government, but it is generally understood that it can not be subject to a despotism in any of its public functionaries. The man who is the subject of despotic power, and I care not whether it be in the legislative or executive department, is a slave and not a republican. Liberty and despotism can never exist together. No general grant would confer an unlimited power over the lives, the liberty or the property of the citizen. It was well remarked by Judge Story in *Wilkinson v. Leland*, (2 Peters, 657,) that "the funda-

The People v. Toynbee.

mental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people.” And Judge Bronson said in *Taylor v. Porter*, (4 Hill, 145,) “The security of life, liberty and property lies at the foundation of the social compact, and to say that the grant of legislative power, includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration” (conferring legislative power in general terms) “*clothed the legislature with despotic power. Neither life, liberty nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power.*” But, as I have already remarked, the constitution of this state provides expressly that no person shall be deprived of life, liberty or property, without due process of law. This provision is general and applies to and of course limits the power of the legislature. That body can no more deprive any one of his property without due process of law than can a private individual. An act of the legislature is not the due process of law mentioned in the constitution. Those words, as was remaked by Judge Bronson in the case last cited, “can not mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property.” In other words, a man can not be legislated out of his life, liberty or property. That intoxicating liquors were property at the time of the adoption of our state constitution there can be no doubt. They had been for many ages i general use, as well by the prudent

The People v. Toynbee.

and the virtuous as by the reckless and the vicious. To have denied to the former his cheerful glass of cider, or to the laboring man, when worn down with fatigue, the support of his customary restorative, would have excited as much astonishment and created as much resistance in the old time, as would the denial of tea or coffee to our ladies at the present day. Whether those who have gone before us, including the greatest, wisest and best of their days, were right in thus indulging their tastes, or whether their conduct was indiscreet and deserved to be characterized as *criminal*, according to the opinion of modern reformers, are not questions for the consideration of the judiciary. I allude to the former practice to show that intoxicating liquors were property with the general assent of mankind.

It was said by Chief Justice Taney in the license cases from Rhode Island, New Hampshire and Massachusetts, (5 *Howard*, 577,) that "spirits and distilled liquors are *universally admitted* to be subjects of *ownership and property* and *therefore* subjects of *exchange, barter and traffic, like any other commodity in which a right of property exists*;" and Catron, J., remarked, in the same cases, that "*ardent spirits have been for ages and now are subjects of sale, and of lawful commerce, and that of a large class throughout the civilized world, is not open to controversy*. So our commercial treaties with foreign powers declare them to be, and so the dealings in them among the states of this Union recognize them to be." That such liquors are property still admits of no doubt. Their importation from foreign countries is expressly sanctioned, and they are heavily taxed by congressional legislation. If the acts of congress had been legitimately passed by the legislature of this state, we should have been virtually precluded from denying the characteristics of property to what we had directly admitted within our borders and subjected to taxation. The faith of states, which should ever be preserved inviolate, would have forbidden it. We are equally, though possibly not as directly, included by the acts of a general government, of which by our own volition we

The People v. Toynbee.

are a member. Intoxicating liquors are still freely admitted and heavily taxed; and their sale by the importers while in the cask or vessel in which they were introduced into the country, and their purchase by any one, are authorized beyond the reach of state legislation. It is true that their subsequent sale was, at the time of the adoption of our state constitution, subject, and no doubt lawfully subject to the regulations contained in our excise laws. The Supreme Court of the United States has decided on various occasions that state laws regulating the sales of intoxicating liquors are not prohibited by the constitution or laws of the United States. Some of the judges in the license cases from three of the New England states, to which I have alluded, expressed opinions that state laws prohibiting entirely the sale of intoxicating liquors might not conflict with the powers conferred upon, and exercised by the general government; but the decision of that question was unnecessary, as it was admitted by the judges that the statutes of those states were not prohibitory. The remarks of those learned judges as to the right of the states to pass laws prohibiting the sale of foreign liquors had no reference to the limitation of the power of the legislature of the states by their own constitutions; and, besides, they were mere *obiter dicta*, as they were upon a question not at all involved in the cases before them, and would not, according to a rule they had laid down for their own conduct, at all control them or the court of which they were members, in any future determination. From the considerations to which I have alluded, I have no doubt but that imported liquors are still, as they always have been, property.

As to liquors of domestic origin, there are other and possibly more difficult questions. The control of the state over them has not been, nor unless they are introduced from other states can it be, subject to congressional legislation. Whether it is competent for the legislature to prohibit their manufacture in this state is not now a question, as that has not been done. They can yet be lawfully manufactured, and when manufactured are still property, and as such are equally with imported

The People v. Toynbee.

liquors protected by the ægis interposed by our state constitution.

It is clear, as I have before intimated, that the protection to property extends to and includes its generally conceded characteristics, especially those without which it would be valueless; otherwise it would be but nominal and scarcely that. It was contended, however, by the counsel for the people, that the sale of intoxicating liquors was not prohibited by the statute; that any of them might be sold for medicinal, manufacturing and sacramental purposes, and that foreign liquors might be sold by the importers in the original cask, or vessel, to any one. The permitted sales would be very inconsiderable. And the statute if carried into full, and its designed, operation would effectually prevent its use as an ordinary beverage by the great mass of the people — the use for which it was mainly designed, and without which it would be of little or no value. It might be accessible to the wealthy, but would be unattainable by men of moderate means. That would create a distinction between the rich and the poor which should ever be avoided in legislation, if it is desirable that our laws should be respected or enforced. It is no matter what may be the pretence, the denial would be a restriction; and that to be just, should operate upon all, if not equally, the inequality should not be the direct and palpable effect of the statute. I consider the statute in question as mainly prohibiting the sale of intoxicating liquors as a beverage, and destructive of its principal value, and with that impression I must adjudge it to be null and void to that extent.

The inviolability of the rights of private property is subject to the prerogative resulting from the eminent domain always existing in the sovereign power to take it for public purposes, on paying an adequate compensation to the owner. But the compensation must consist of a direct and specific remuneration, and not merely of the general good conferred upon the community by the passage of a beneficent law. The prohibitory law does not, nor from the nature of the case could it, make any direct compensation to the owners for the property which it is proposed to sacrifice.

The People v. Toynbee.

So, too, there is necessarily reserved the right of taxation; but the exercise of such right, although it requires the contribution of a portion of what belongs to the citizen, in effect rather increases than diminishes the value of the entire property, by the security which it enables the public to give to all that is retained.

The interest in the question as to the validity of the prohibitory law is not confined to those only who may own the property which it is proposed in effect to render unavailable to the proprietor. It extends to the entire community. If the shield of constitutional protection can be withdrawn from one species of property, any other may be successfully assailed under some specious pretences, or indeed without any at all. It is by no means a sufficient answer to this to say that the power over property which is now claimed in behalf of the legislature, would not be liable to abuse, as the members are elected by the people, with whom they retain a community of interests, and as they enjoy but a short term of office, and must soon return to the ranks of private life.

The patriots of the revolution who formed our national constitution, and the enlightened members of the convention which adopted our state constitution, thought otherwise, and accordingly limited the power of the legislature expressly in several important particulars, and by implication in many others. They, no doubt, thought, and rightly thought, that the possession of despotic power by any department of our government would be inconsistent with our free institutions, and that the safety of our lives, our liberty and our property, required that they should not be subjected to the arbitrary disposal or control of any man or set of men.

It may be that the ordinary use of intoxicating drinks necessarily leads to their frequent abuse, and that the interests of society require that property in them should be in effect annihilated. If so, they might, and possibly should, be drawn from the pale of constitutional protection. But that has not yet been done, nor can it be done by any other power than that by which our organic laws were ordained. Whatever those

The People v. Toynbee.

institutions require the court must award, as it is the duty of the judges, imposed upon them by their official position, and under the solemnity of an oath, to support the constitution of our common country, and of our own state from whatever quarter, or under whatever pretence, they may be assailed.

I have not the slightest wish to extend any protection or encouragement to the habit of inebriation, or to throw any impediment in the way of the good and the virtuous who are so solicitous to arrest its progress. It is an abomination, and should be suppressed (so far as human means can do it,) by precept, by example, and by legitimate legislation. But we should go no further lest we "do evil that good might come." The injunction against that is wise; as the evil is certain, while the production of the good might be, at least, problematical.

The judgment in the court below being erroneous, it must be reversed

ROCKWELL, J.—The defendant has been convicted before a court of Special Sessions held by the county judge of Dutchess county, of having sold intoxicating liquor in violation of the act for the prevention of intemperance, pauperism and crime, passed April 9, 1855. It is claimed that the defendant should be discharged from custody.

1. Because so much of the said act as prohibits the sale of intoxicating liquor is void. That such prohibition is an unauthorized invasion of private rights, and a violation of the fundamental law.

It is clear that under every free government there are certain fundamental and inherent rights belonging to individuals which are not solely dependent upon the will of the legislature; and it is unnecessary to examine the written constitution of the state to ascertain whether they are expressly shielded by that instrument from legislative encroachment. The rights of personal security, or personal liberty, and private property do not depend upon the constitution for their existence. They existed before the constitution was made or the government

The People v. Toynbee.

was organized. These are what are termed the absolute rights of individuals, which belong to them independently of all government, and which all governments, that derive their powers from the consent of the governed, were instituted to protect. They are defined as follows: "By the absolute rights of individuals we mean those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." (1 *Blackstone's Com.* 123.)

But while these rights are better protected, they are not as entirely absolute under government as in a state of nature. They are subservient to such measures as become necessary for the preservation of the government, its defence against external or internal enemies, or the promotion of the best interests of the whole community. For the protection of the government against external danger, individuals may be compelled to enter the military service, and to subject and expose themselves to the hardships and perils of war. For the protection of society against the consequences of crimes, offenders may be deprived of liberty, property or life. Lunatics who become dangerous to others may be imprisoned. Persons sick of contagious diseases may be removed to and placed in hospitals. Property may be removed or destroyed, or trades suppressed, which endanger the public safety or health. Property may be taken from individuals in the form of taxes, and applied toward the support of the government and its institutions. In short, government is not to be restrained in the exercise of its legitimate powers, which are essential to the public welfare, because the rights of individuals would be injuriously affected thereby.

In cases where private property is directly and specifically taken for the public use, compensation must be made to the owner. But cases are constantly occurring where individuals are subjected to great and ruinous losses of property through the operation of public measures and laws; but these losses being merely consequential and incidental to the exercise of the legitimate powers of the legislature, the individual injury is not the subject of legal redress. Individual loss frequently

The People v. Toynbee

results from the grading of streets, the construction of canals, bridges, ferries, railroads and similar improvements; but if the law-making power in the exercise of its legitimate discretion decides that such improvements are conducive to the public good, no individuals whose injuries are consequential merely will be permitted to arrest the action of the government, or will even be entitled to compensation for the injury which he may sustain. *Radcliff's Executors v. The Mayor, &c., of Brooklyn.* (4 *Comstock's Reports*, 195.)

We may assume for the purposes of this case, at least, that the legislature of a free state is not competent to pass a tyrannical law; that is, one which restrains the natural rights of individuals for any other purpose than to advance some public good or to repress some public evil. The distinction between laws which are tyrannical because they unnecessarily infringe upon the absolute rights of individuals, and those which are consistent with civil liberty, although in restraint of natural liberty, is very clearly pointed out by Blackstone, as follows:

“Political or civil liberty, which is that of a member of society, is no other than natural liberty, so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public. Hence we may collect that the law which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, that even laws themselves, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty; whereas, if any public advantage can arise from observing such precepts the control of our private inclinations in one or two particular points will conduce to preserve our general freedom in others of more importance by supporting that state of society which alone can secure our independence.” (1 *Black. Com.*, 125.)

There is no doubt that a great number of individuals will

The People v. Toynbee.

sustain serious loss of property and derangement of business through the operation of the prohibitory feature of the law in question. But this consideration is not decisive of the question of legislative competency. The question still remains: Was the passage of the act an exercise of the legitimate discretion and power of the legislature founded upon considerations of public policy, tending to promote the morals, the health and safety of the community, or was it a mere wanton and unnecessary invasion of the private rights of individuals?

Any interference with the right of property is not the primary object of this law. Its object is to prevent intemperance, pauperism and crime. Surely these are proper subjects of legislation. A law aiming at the prevention of these evils by regulating, and to a certain extent prohibiting the sale of intoxicating liquor, has long existed as one of the police regulations of the state. The present law assumes that the former law has been found insufficient to accomplish the ends for which it was designed. That the regulation of the sale of intoxicating liquor having failed to suppress intemperance, pauperism and crime, and the public evils flowing therefrom, it has become necessary to try what virtue there is in prohibition.

Whether the law can be carried into effect, whether the whole result will not be a mere legislative enactment of prohibition without the power of enforcing it practically, whether the evils at which the law is pointed will not be aggravated instead of suppressed, are matters addressed solely to the discretion of the legislature, and with which the judicial branch of the government has no concern.

The objects of the law are matters in which the whole community are interested. Drunkards, paupers and criminals are burdens upon the public, enemies to the peace, welfare and happiness of society. Can it be doubted that if the traffic in intoxicating liquor was entirely suppressed their number would be greatly diminished?

It is enough to uphold this law that its tendency is to prevent the public evils against which it is directed, and to pro-

The People v. Toynbee.

mote the public benefits which it is designed to reach. It is not difficult, by ignoring the whole object and purpose of the law, to make out a very plausible case of legislative encroachment upon private rights. But this is not a just or fair mode of considering it. The great ends of public policy which it was intended to subserve are clearly within the scope of legislative competency. The public evils which it was intended to suppress are the most formidable to the peace and welfare of society which those who make or administer the laws are called upon to encounter. Assuming that the legislature have acted in good faith, that they have not wantonly and unnecessarily invaded private rights under the mere pretence of preventing public evils, I think the question whether the public benefits are of greater weight or importance than the individual losses which will result from the prohibition of the sale of intoxicating liquors as a beverage, is one of legislative discretion, and with which the judiciary has no concern. It was for the legislature to determine to what extent it was necessary to interfere with private rights in order to accomplish the great ends of public policy which they had in view; to array on the one side the serious loss of property and derangement of business which must ensue from the passage of this law, and on the other the appalling statistics of intemperance, pauperism and crime, and then determine whether the public necessity was sufficiently urgent to justify the individual wrong.

But is further claimed that the defendant should be discharged from custody.

2. Because it does not appear, from the complaint under which he was arrested and convicted, that he sold liquor which was not imported. That, by the true construction of the exception at the close of the first section of the act, the unrestricted sale of an imported liquor is permitted. The language of this exception is as follows: "This section shall not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States." It is said, that as this clause occurs in a penal statute, and is part of the definition of the offence which it is the intention of the law to prohibit

The People v. Toynbee.

and punish, it must be *strictly* construed. This may be so; but a *literal* construction of the clause will render it entirely nugatory. The rights of those whose interests are protected by the exception forbid such a construction. There is no law or treaty of the United States by which the right to sell any description of liquor is *given* directly or indirectly. The right to sell liquor or other property is not given by any law of the United States or the state of New York. It exists as a necessary incident to the right of property, independently of any positive law. It has been held by the courts of the United States that the right to sell liquor of a certain description and in a certain condition, is *secured* by the operation of certain laws of the United States against any restraint of the right of sale by state legislation. That is to say, when the act of congress authorizes the importation of liquor, the right of the importer to sell it results as a necessary incident to the right to import, and is secured to him against any interference on the part of the state legislature by the paramount authority of congress. The question then is, what description of liquor is it the right to sell which, notwithstanding any prohibition by the laws of this state, is derived from or secured by the act of congress? It is imported liquor, in the casks or packages in which it was imported. The exception from the prohibition is exactly coextensive with the right to sell secured by the act of congress; and the exception was plainly and solely intended to avoid a conflict between the state and federal laws. Any other construction would be so totally at variance with the whole spirit, scope and intention of the entire law as in my judgment to be utterly inadmissible.

The rules by which the sages of the law have ever been guided in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the wisdom of ages. (*Plowden's Rep.*, 205.)

The resolutions of the barons of the exchequer in *Heyden's* case were the following: "For the sure and true interpretation of all statutes in general, be they penal or beneficial, re-

The People v. Toynbee.

strictive or enlarging of the common law, four things are to be discerned and considered:

“1. What was the common law before the making of the act?

“2. What was the mischief and defect against which the common law did not provide?

“3. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth?

“4. The true reason of the remedy. And it was held to be the duty of the judges at all times to make such construction as should suppress the mischief and advance the remedy, putting down all subtle inventions and evasions for continuance of the mischief, *et pro privato commodo*, and adding force and life to the cure and remedy according to the true intent of the makers of it *pro bono publico*.” (3 Reports, 7.)

Surely we are not called upon to reverse these admirable rules for the construction and interpretation of statutes, and so to construe this act as will certainly and clearly advance the the mischief which it was intended to suppress, and suppress the remedy which it was intended to advance.

It is further claimed that the defendant is entitled to his discharge.

3. Because the proceedings against him were in violation of law and void. I can perceive no substantial error in these proceedings down to the time when the defendant was brought before the county judge upon the warrant issued by that magistrate for his arrest.

He then demanded that his examination should be taken, and offered bail for his appearance at the next court of Sessions of Dutchess county. This was refused, and he was therefore tried and convicted before a court of Special Sessions held by said county judge. In refusing an examination or to take bail for the appearance of the defendant, I think the county judge committed an error which was fatal to the validity of all the subsequent proceedings against the defendant. The examination of the defendant, should have been taken by the county judge; and if upon the examination of the whole mat-

The People v. Toynbee.

ter it appeared either that no offence was committed, or that there was no probable cause for charging the defendant therewith, he should have been discharged. If there was probable cause to believe the defendant guilty, bail should have been taken if offered by the defendant for his appearance at the next court having cognizance of the offence. (2 R. S., 708, 709, 710.)

A court of Special Sessions is one of limited jurisdiction, deriving all its power from the statute. It could only acquire jurisdiction over the person of the defendant upon his request to be tried before it, or his omission for twenty-four hours after being required to do so to give bail for his appearance according to law. (2 R. S., 711, 712.)

I think the conviction of the defendant was void and does not authorize his detention in custody.

Proceedings in both cases reversed.

SUPREME COURT, Erie General Term. September, 1855.
Green, Bowen and Mullett, Justices.

JAMES G. WYNEHAMER, Pl'ff in error *vs.* THE PEOPLE, &c.,
 Def'ts in error.

Bills of exceptions in criminal cases were unknown to the common law. They are given by statute, and their office is to bring up for review questions of law decided at the trial. They are limited to exceptions taken on the trial of the *main issue*, and are not available as to decisions made on the trial of preliminary, or collateral questions.

Decisions made on a motion to quash an indictment on the grounds of irregularity in organizing the grand jury, and on the trial of an issue joined on a challenge to the array of jurors, are not reviewable on a bill of exceptions.

The last clause of the first section of the act, entitled "an act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, does not exempt imported liquors from the operation of that act, after they have passed from the ownership of the importer.

The provisions of the first section of the act prohibiting the sale of intoxicating liquors, are not in contravention of that clause of the constitution of this state, which declares, that "no person shall be deprived of life, liberty and property without due process of law."

This case was brought up on a writ of error to the Court of Sessions of Erie county. The indictment was as follows:

State of New York, County of Erie, ss:

The jurors of the people of the state of New York, in and for the body of the county of Erie, upon their oaths present, that James G. Wynehamer, on the fifth day of July, in the year one thousand eight hundred and fifty-five, at the city of Buffalo, in the county aforesaid, without having any lawful authority, willfully and unlawfully *did sell* to some person unauthorized by law to sell intoxicating liquor, to the jurors aforesaid unknown, intoxicating liquor, to wit: one gill of rum, one gill of brandy, one gill of whisky, one gill of gin, one gill of wine, one gill of strong beer, one gill of cordial—the said intoxicating liquor then and there not being alcohol

Wynehamer v. The People.

manufactured by the said James G. Wynehamer, or pure wine manufactured by the said James G. Wynehamer from grapes grown by him, without having filed in the office of the clerk of the county of Erie, any undertaking approved by the county judge of the county of Erie, according to the provision of the second section of an act of the legislature of the state of New York, entitled "An act for the prevention of intemperance, pauperism and crime," passed April 9th, 1855; and the sale of which said intoxicating liquor, in the manner aforesaid, then and there not being authorized by any law or treaty of the United States; and no right then and there to sell the aforesaid intoxicating liquor, then and there being given by any law or treaty of the United States; and contrary to the form of the statute in such case made and provided, and against the peace of the people of the state of New York, and their dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said James G. Wynehamer on the sixth day of July, in the year last aforesaid, at the city and in the county aforesaid, without any lawful authority willfully and unlawfully did sell to some person unauthorized by law to sell intoxicating liquor, to the jurors unknown, intoxicating liquor, to wit: one gill of rum, one gill of brandy, one gill of whisky, one gill of gin, one gill of wine, one gill of strong beer, one gill of cordial—the said intoxicating liquor then and there not being alcohol manufactured by the said James G. Wynehamer, or pure wine manufactured by the said James G. Wynehamer, from grapes grown by him; without having filed in the office of the clerk of the county of Erie, any undertaking, approved by the county judge of said county, according to the provisions of the second section of an act of the legislature of the state of New York, entitled "An act for the prevention of intemperance, pauperism and crime," passed April 9th, 1855; and the sale of which said intoxicating liquor, in the manner aforesaid, was not then and there authorized by any law or treaty of the United States, and no right then and there to sell the aforesaid intoxicating liquor, then and there

Wynehamer v. The People.

being given by any law or treaty of the United States, contrary to the form of the statute in such cases made and provided, and against the peace of the people of the state of New York, and their dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said James G. Wynehamer on the seventh day of July, in the year one thousand eight hundred and fifty-five, at the city and in the county aforesaid, without any lawful authority, willfully and unlawfully did sell to some person unauthorized by law to sell intoxicating liquor, to the jurors aforesaid unknown, intoxicating liquor, to wit: one gill of rum, one gill of brandy, one gill of whiskey, one gill of gin, one gill of wine, one gill of strong beer, one gill of cordial—the said intoxicating liquor then and there not being alcohol manufactured by the said James G. Wynehamer, or pure wine manufactured by the said James G. Wynehamer, from grapes grown by him, without having filed in the office of the clerk of the county of Erie, any undertaking, approved by the county judge of said county, according to the provisions of the second section of an act of the legislature of the state of New York, entitled “An act for the prevention of intemperance, pauperism and crime,” passed April 9th, 1855; and the sale of which said intoxicating liquor then and there not being authorized by any law or treaty of the United States, and no right then and there to sell the aforesaid intoxicating liquor, then and there being given by any law or treaty of the United States, contrary to the form of the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity.

ALBERT SAWIN, *District Attorney.*

The defendant pleaded not guilty.

The cause came on for trial in the Court of Sessions, on the 20th July, 1856.

The counsel for the defendant moved to quash the indictment because, among other things, of irregularity in impanneling and organizing the grand jury who found the indictment.

Wynehamer v. The People.

After hearing the motion argued by counsel, the court denied the motion, to which decision the counsel for the defendant excepted.

A challenge to the array of jurors was then interposed as follows: "and hereupon the said James G. Wynehamer, challenges the array of the said panel because he saith six days notice of the drawing of said jury was not given in the manner required by law. That no sheriff or county judge was present at the drawing of said jury. That such jurors were not summoned by the sheriff six days before the first day of court. That no list of jurors drawn was made or certified by the clerk, or delivered to the sheriff as required by law. That the officers who summoned said jurors have not made any proper or legal return, nor is there any proper return of lists of jurors delivered to the sheriff to summon. That the return of the lists of jurors delivered to him to be summoned does not specify the jurors summoned, nor the manner in which each was notified. That some of said jurors were summoned by Alvah P. Hamilton, who was not duly authorized or empowered to summon jurors, and this he is ready to verify, wherefore he prayeth judgment that the panel may be quashed."

To which challenge the following plea was interposed.

"The said people, by Albert Sawin, district attorney, to the above challenge answers and says, that none of the matters therein set forth are true and therefore he prays said challenge go for naught."

The counsel for both parties agree that the issue of fact joined on said challenge should be tried by the court, and the counsel for the prosecution proceeded to examine witnesses in support of the challenge. After hearing the evidence, the court decided the challenge was not well taken, to which decision the defendant's counsel excepted.

A jury was then impaneled, and the counsel for the people introduced evidence tending to show, that on several times and occasions, between the fourth and fourteen days of July, 1855, the defendant sold and delivered to several persons, in quanti-

Wynehamer v. The People.

ties less than one pint, brandy, at his bar in Buffalo, which was drank on his premises.

After the prosecution had rested the case, the counsel for the defendant requested the court, either to discharge the defendant, or to direct the jury to find a verdict of not guilty, on the following grounds.

1st. That it does not appear that any offence has been committed by the defendant.

2nd. That the charge in the indictment was not proved.

3rd. That it does not appear but that the liquor alleged to have been sold, was liquor the right to sell which was given by laws or treaties of the United States.

4th. It does not appear but the liquor sold was imported into this country by defendant, from foreign countries in pursuance of the United States laws.

5th. That the first section of the act entitled "An act for the prevention of intemperance, pauperism and crime," is in violation of the constitution of this state and of the United States, and is void.

6th. That the fourth section of said act is likewise contrary to said constitution and is void.

7th. That the whole act is also unauthorized by and in conflict with the laws and treaties of the United States and the constitution of the state of New York, and is void.

8th. That it does not appear but that the liquor sold by the defendant, if any, was authorized to be sold by the statute above referred to.

The court overruled each of the objections, and the defendant's counsel excepted.

The defendant's counsel then offered to prove that the liquor sold by him was imported into this state from foreign countries, under and in pursuance of the revenue laws of the United States, and that the legal duties had been paid thereon, that the defendant purchased said liquor from the importers in the imported packages, and that the same was drawn from such packages and sold to the persons, and at the times proved by the witnesses for the people.

Wynehamer v. The People.

The counsel for the people objected to this evidence as immaterial. The court sustained the objection and excluded the evidence, and the defendant's counsel excepted.

The defendant's counsel then offered to prove that the liquor sold by him was owned by him on and before the third day of July, 1855.

The counsel for the people objected to this evidence as immaterial, the court sustained the objection and the defendant's counsel excepted.

The evidence being closed, the counsel for the defendant asked the court to direct the jury to acquit the defendant, on each and all the grounds before stated by him. The court refused so to charge, and the defendant's counsel excepted.

The jury found the defendant guilty, and judgment being rendered on such verdict by the court, the defendant sued out a writ of error to this court.

F. J. Fithian, for plaintiff in error.

A. Sawin (Dist. Attorney,) for the people.

By the Court, GREENE, J.—All of the exceptions taken by the defendant to the rulings of the court below on the motion to quash the indictment for irregularity, and on the trial of the issue joined on the challenge to the array are improperly incorporated in the bill of exceptions. Bills of exceptions in criminal cases were unknown to the common law. The right to a bill of exceptions in such a case is given by statute. Its office is to bring up for review questions of law made and decided on the trial. But the statutes which give the right, limit it to exceptions taken on the trial of the *main issue*. It is not extended to such as are taken on the trial of preliminary or collateral questions, (2 R. S. 736, S. 21; *The People v. Freeman*, 4 Denio, 21, *per Beardsley, J.*) It will therefore be unnecessary to examine the various questions raised by those exceptions, as our conclusion on them either way could not affect the result. The same answer must be given to many of the questions suggested

Wynehamer v. The People.

by the exceptions taken on the trial of the main issue and discussed on the argument. *The facts proved* on the trial do not raise the questions, and any opinion which we might express upon them would be the mere result of a gratuitous speculation upon questions in which the defendant has no legal interest.

The indictment was for selling brandy (not being liquor, the sale of which was authorized by the laws of the United States) to persons not authorized to sell liquor by the act under which the indictment was found. The prosecutor proved several sales by the defendant of brandy at his bar in quantities less than one pint, which liquor was drank on his premises. The defendant offered to prove that the brandy sold by him was imported from foreign countries under the revenue laws of the United States, that the duties had been paid thereon, that he purchased it from the importer in the packages in which it was imported, and that it was drawn from the packages and sold by him, as proved on the trial. The evidence was rejected as immaterial and the defendant excepted. He also offered to prove that the liquor in question was owned by him on and before the third day of July, 1855. This evidence was rejected on the same ground, and the defendant excepted.

Two questions of law arise on these facts and exceptions: 1st. What is the extent of the prohibition *upon the sale of liquor* contained in the first section of the act as it is qualified by the second and other sections, and 2d. Is *that prohibition* a valid legislative act.

That part of the first section that bears upon these questions is in these words: "Intoxicating liquor except as hereinafter provided shall not be sold * * * * by any person for himself or any other person in any place whatsoever." Then follows divers provisions prohibiting the giving away or keeping such liquor in certain specified places, which provisions, as they have no bearing upon the questions above stated, require no examination. The last clause of the section is in these words: "*This section shall not apply to liquor* the right to sell which is given by any law or treaty of the United States."

Wynehamer v. The People.

The second section provides that certain persons on complying with its provisions "may keep for sale and may sell intoxicating liquor and alcohol for mechanical, chemical or medicinal purposes, or wine for sacramental use." The twenty-second section contains several provisions in relation to the construction of the act, and among others a provision that nothing in the act shall be construed so as to prevent "the importer of foreign liquors from keeping or selling the same in the original packages to any person authorized by the act to sell such liquors." These provisions embody all the prohibitions and exceptions material to the questions under consideration contained in this act.

It will be observed that this act contains no provisions excepting any liquor *specifically* from the operation of the prohibitory clause. The exception in the first section relates to "liquor the right to sell which is given by any law or treaty of the United States." No law or treaty of the United States has been cited, and I am not aware that any exists, expressly giving the right to sell any *specific* liquor. But there are divers laws and treaties providing and stipulating for the admission of foreign liquors into the United States upon certain terms prescribed by such laws and treaties. These laws and treaties were created and entered into in pursuance of the power conferred upon congress by the constitution of the United States "to regulate commerce with foreign nations and among the several states and with the Indian tribes." (*Art. 1, § 8.*) In the case of *Brown v. The State of Maryland* (12 *Wheat.*) it was held by the Supreme Court of the United States that an act of that state requiring importers to take out a license to sell imported merchandise was repugnant to the provisions of the constitution of the United States, prohibiting the states from laying duties upon imports. Chief Justice Marshall in the same case held that an importer of foreign merchandise who had imported the same under the revenue laws of the United States acquired a right under such laws to sell the imported article in the *state* and *condition* in which it was imported, that the law of Maryland was a regulation of

Wynhamer v. The People.

foreign commerce and as such was in conflict with the revenue laws of the United States. Justice Thompson dissented from the positions taken by the chief justice, and insisted upon the right of the state to levy the license tax as a legitimate exercise both of its power of taxation and its power to regulate its own internal trade, holding that the importer acquired no right under the laws of the United States to sell the imported article independent of state regulation. In the cases of *Pierce v. The State of New Hampshire*, *Thurlow v. The State of Massachusetts*, and *Fletcher v. The State of Rhode Island*, commonly known as the "license cases," (5 *How. S. C. R.*, p. 1,) the question as to the right of the states to regulate and prohibit the sale of liquors, the importation of which was authorized by the laws of the United States, was brought before the same court. The statute of Massachusetts under which one of the cases originated made it unlawful for any person to sell intoxicating liquor without a license, in quantities less than twenty-eight gallons. The law also contained an express provision that the selectmen in whom the power to grant licenses was vested, should not be *compelled to grant any licenses*. The statute of New Hampshire prohibited the sale of liquor in that state in *any quantity* without a license. The law of Rhode Island contained provisions similar to those contained in the law of Massachusetts. The defendants were indicted and convicted in the state courts for violations of these laws, and the judgments being affirmed by the Supreme Courts of the states respectively, were carried by writs of error to the Supreme Court of the United States. In that court it was contended on the authority of *Brown v. Maryland*, that the laws of Massachusetts and Rhode Island were void on the ground that the laws of the United States authorized the importation of the liquor sold by the defendants in those cases (which liquor had been actually imported) and that the state laws were in conflict with those of the United States. The liquor sold by the defendant in the New Hampshire case was imported from Massachusetts and it was contended that the law of that state was repugnant.

Wynehamer v. The People.

to the provision of the constitution authorizing congress to regulate commerce among the states.

But the court held that the laws of the states must be construed as applying exclusively to the *domestic* trade in liquor, that they had no application to imported liquor in the hands of importers, that they did not interfere with his right to sell in the original packages as laid down in *Brown v. Maryland*, and were not for that reason in conflict with the laws of the United States under which the liquor was imported. In the New Hampshire case it was held that the state law was a regulation of commerce "among the states within the meaning of the constitution and so within the power of congress. But the law was sustained on the ground that the power of congress and the state legislature were concurrent and that as congress had passed no law regulating commerce among the states the state law was valid until congress passed some law conflicting with the provisions of the state law. Chief Justice Taney in these cases reiterated the doctrine laid down by Chief Justice Marshall in *Brown v. Maryland* and held that the right to sell imported liquor derived from the United States was confined to the importer and to liquor in the casks or packages in which it was imported and that when it passed from his hands it ceased to be *an import* and became subject to state regulation. It will be remembered that the law of Massachusetts prohibited sales in less quantities than twenty-eight gallons and that the law of congress authorized the importation of the *same liquor* in quantities of fifteen gallons and that the law could be sustained upon no other ground than that assumed by the chief justice consistently with the rule asserted by the majority of the court, in *Brown v. Maryland*. In the license cases, Justices Daniel, Woodbury, and Grier dissented from the doctrine laid down by the chief justice and by Chief Justice Marshall in *Brown v. Maryland* asserting the right of the importer under the laws of the United States to sell imported merchandize uncontrolled by state regulation. The soundness of this rule is questioned by those learned justices and *Brown v. Maryland* was not regarded as an *authority* for the rule.

Wynehamer v. The People.

The question was not directly involved in either case and it may be doubted whether it is not still open to discussion upon principle. But it will be perceived that the right to sell imported liquor given by the laws of the United States under the broadest rule laid down by a majority of the court in the cases cited is subject to two important qualifications. 1st. That it remains in the hands of the importer, and 2d. That it shall be sold in the condition in which its importation is authorized, that all sales by *other persons or in any other quantity or condition* than that in which it is imported are subject like the sales of all other property to such regulations as may be prescribed in state laws.

The question then arises as to the true construction of the exception contained in the first section of the prohibitory act. The plaintiff in error contends that it extends to all *liquors in specie*, the right to sell which under *any circumstances* is given by the laws of the United States. The repugnancy of this construction to the entire policy of the act as manifested by its provisions, is too plain to escape observation and if the language of the exception will fairly admit of two constructions it should receive that which will best harmonize all the provisions of the act. The object of this clause, whatever the effect of its construction may be, is rendered plain by a reference to the subject matters to which it relates. It was assumed by the legislature that a right to sell certain liquor was given by the laws of the United States. We have seen that this right considered in its utmost extent as defined by the court whose province it is to give a construction to those laws is neither general as to persons nor in its application to the property to which the laws in question relate. The right on the contrary is limited to *certain persons* and qualified by the *status of the property*. While it is in the hands of the importer, and in the condition in which it was imported, the laws under which he has imported it, give him a right to sell it in that condition. This is the extent of the right. When he parts with the property, or changes its condition, his right and *all right* to sell it, derived from those laws, ceases. It is no

Wynehamer v. The People.

longer the right to sell *which* is given by the laws of the United States. The object of this exception in the first section clearly was by preserving the right secured by the laws of the United States to avoid collision with those laws, and the general exception of *certain liquors in specie*, from the operation of the first section which is claimed from a literal reading of the clause in question should be controlled by the limitations as to persons and the qualifications as to the status of the property which are annexed to the right of sale given by the laws of the United States, so that the provisions of the first section will not apply to imported liquor still in the hands of the importer and in the casks, bottles or packages in which it was imported. The propriety of this construction is rendered plain by a reference to the language of the 22d section already quoted. This clause whatever its purpose, or however unnecessarily inserted may be resorted to on this question of construction as evidence of the intention of the legislature. The second section as we have seen, provided that certain persons, on the conditions therein prescribed might sell liquor for certain purposes. Importers were not mentioned in this section, nor was it necessary under any construction of section first according to the rule laid down in the license cases that importers should be mentioned in that section, but the legislature apparently as a matter of precaution inserted the clause last cited in the twenty-second section. It refers to the same subject matters as the last clause of section first, and may be properly read in connection with it, and when these two clauses are read together in the light of all the provisions of the act, I think the true construction of the first section is reasonably plain. It follows that the liquor sold by the defendant was not exempted from the operation of that section. The evidence offered by him to prove that it had been imported was therefore immaterial and was properly rejected. The only remaining question is as to the validity of the prohibition. It is claimed by the defendant that the prohibition is repugnant to the provisions of the sixth section of the first article of the constitution and therefore void. That part of the section in question

Wynehamer v. The People.

to which the prohibition is supposed to be repugnant is in these words: "No person * * * * shall be *deprived* of life, liberty, or *property*, without due process of law; nor shall private property be taken for public use without just compensation."

I do not understand that it is claimed that this provision of the act violates the prohibition contained in the last clause of that part of the section above quoted. It certainly can not be maintained that this part of the act provides for the *taking* of property in any sense of the term. But it is claimed that this prohibition of the sale of liquor does in *effect deprive* the owner of his property in it. The argument is that the right to sell and traffic in property is incident to and inseparable from the title, that such right is one of the chief elements of its value and that a law prohibiting the exercise of this right virtually deprives the owner of his property. That liquor is property, that the right to sell property is one of its recognized legal incidents and that "due process of law" which the constitution prescribes as the only condition upon which the owner of property can be deprived of it, means a trial and judgment in a regular judicial proceeding are propositions too well established to admit of argument or require the support of authority. But that the right to sell and use property at the will of the owner is absolute and subject to no restraint can not be maintained and will hardly be asserted. The rights and interests of individuals are, to some extent at least, subordinate to those of the public and must yield to them in cases of conflict. It is the acknowledged province of legislation to prescribe by law such rules concerning the title to property and its sale and use as will, in the judgment of the legislature, most effectually secure to the owner the enjoyment of these rights on the one hand and on the other protect the public from injuries that may result from the exercise of them. This power however is subject to the restraints imposed by the constitution through which in this state the legislature derives its powers. We have then only to compare the provision heretofore cited of the first section of the prohibitory act with the above provi-

Wynehamer v. The People.

sion of the constitution, and from such comparison to determine whether there is any conflict between the law and the constitution. The provision of the first section as qualified by the second section so far as the sale of liquor is concerned is in substance that intoxicating liquor except for mechanical, chemical or medicinal purposes shall not be sold, &c. The provision of the constitution is that no man shall be deprived of his property without due process of law. The question is, does this prohibition *deprive* the owner of liquor of that property? It does not deprive him of the possession or use of it; but while it remains in the state, subject to the law, it undoubtedly diminishes its value; and hence it is agreed, that the owner is to that extent virtually deprived of it. Substantially the same prohibition as that contained in our present constitution, has existed in all our constitutions since the organization of the state government; and under each of these constitutions laws were passed imposing restraints, to a greater or less extent, upon the sale of liquor. The validity of those laws has never, to my knowledge, been questioned. But the difference, it is urged, between those laws and the present law is, that those laws merely *regulated*, while this *prohibits* such sale. It remains to be seen whether there is any difference in principle between the two cases when they are regarded with reference to the objection now under consideration. The only cases cited in which this question has been considered by this court, are those of *The People v. Berberich*, and *The People v. Toynbee*, decided at a general term in the second district, by Justices Brown, Strong and Rockwell. A prosecution was commenced in each case before a magistrate, upon a charge of selling, and having with intent to sell, intoxicating liquor. Both defendants were convicted, and in *Toynbee's* case a fine was imposed pursuant to the statute, and a judgment of forfeiture, directing the destruction of the liquor, was rendered, from which judgment the defendant appealed to this court. *Berberich's* case was removed by certiorari before sentence. An objection was taken before the magistrate in *Toynbee's* case, to the sufficiency of the complaint, and also to the jurisdiction

Wynehamer v. The People.

of the magistrate to proceed to try the case after the defendant had offered to give bail to answer to an indictment; and, as I understand the opinion of Justice Brown, the last objection was taken in *Berberrich's* case. Justice Strong held both objections good, and my recollection of Justice Rockwell's opinion (which I have not now before me) is, that he concurred with Justice Strong as to the validity of the above objections, and concurred in the judgment *on that ground alone*. Justice Brown held that the last objection was not well taken, but held that the first section of the law, so far as it prohibits the sale of liquor, the sections or provisions which provide for its seizure and destruction, and several other provisions under which (as I understand the facts from the several opinions) no questions were raised in the cases, were unconstitutional. Justice Strong concurred in this opinion as to the unconstitutionality of the prohibitory clause of the first section, and the judgments were reversed. Both of the learned justices placed their opinion upon the ground that the prohibition of the sale of liquor was *virtually* depriving the owner of his property in it. Justice Strong says: "The protection of any species of property must necessarily extend to its essential and definitive characteristics, *especially those which constitute its main value*."

* * * One of the essential characteristics of property is its vendibleness, especially for the principal use to which it can be appropriated. * * That the manner of selling it may be *regulated*, so long as the *right is essentially preserved*, there can be no doubt. * * * Upon the whole, my conclusion is, that the right of property extends not only to its *corpus*, but to *ordinary and essential characteristics*, of which the right of sale is one, and that it can be controlled *only so far as to prevent abuse*, without destroying such characteristics." The learned justice, speaking of our former excise laws, thus states the difference between the present statute and those laws: "They were, however, by no means *prohibitory of the right*; every man was at liberty to sell in quantities exceeding five gallons, and a *selected class*, in any quantity." In conclusion, the learned justice says: "I consider the statute in question as

Wynehamer v. The People.

mainly prohibiting the sale of intoxicating liquor as a beverage, and destructive of its *principal value*; and with that impression, I must adjudge it to be null and void to that extent." Justice Brown, speaking of the character of the act, says: "If its office is one of mere regulation, to prescribe *by whom* and to whom and at what places liquors in certain quantities may be sold, then it does no more than the excise law which it is thought to supersede; and although *prejudicial to existing interests*, and may subject certain classes to *some privations and inconvenience*, it is nevertheless a law of binding obligation, which the people must obey and the tribunals of justice enforce." Speaking of the written limitations upon legislative power, contained in our state constitution," the learned justice adds: "They were intended to save absolute inherent rights from the power of legislative acts which *interrupt their enjoyment* or *impair* their value. * * * There can be no property, in the legal and proper sense of the term, where neither the owner or the person who represents the owner has the power of the sale and disposition. That which can not be used, enjoyed or sold, is not property; and to take away all *or any* of these incidents, is in effect to deprive the owner of his property."

Both of the learned justices from whose opinions I have quoted, concede the power of the legislature to regulate the "manner of selling," and to prescribe "by *whom* liquors in certain quantities may be sold." Upon what principle, consistent with this constitutional provision, if it is applicable at all to this species of legislation, can the legislature, in the language of one of the learned justices, prescribe "*by whom*" liquors in certain quantities may be sold, or in the language of the other learned justice, designate a "*selected class*" to sell in such quantities, while it *prohibits* others from doing the same thing. Those who do not happen to be thus "*prescribed*" who do not belong to the "*selected class*," and who may happen to own liquor in quantities less than those in which all are authorized to sell, would be as effectually "*deprived of their property*" under such a law, as those who own larger

Wynehamer v. The People.

quantities are so deprived by this law. It is no answer to say that such a law would affect but few persons and a limited amount of property, nor that its object is to *regulate "only so far as to prevent abuse."* The protection of this constitutional provision, in its letter and spirit, extends in equal measure to each individual, and the aggregate population of the state, and to *all property*, whether its value is measured by mills or millions. It matters not whether a few or many are deprived of their property, or whether the amount of which they are deprived be small or great, whether a person is deprived of an inconsiderable portion or all of his property. The constitutional prohibition is not fractional, but an unit, indivisible and absolute. It regards the *character of the act*, and not the *extent of its consequences*. If the act is prohibited, no consideration of consequences can change its character, nor can it be palliated by the purpose which prompted it, however laudable. If, therefore, a law, which in its operation diminishes the value of property, can be regarded as *depriving* the owner of it, no law that produces that effect can be sustained. The argument under consideration, when followed to its logical consequences, will not, and can not be satisfied with the overthrow of the law in question. Many of our police and sanitary, and all of our commercial regulations, our quarantine and usury laws, must share the same fate. Their effect upon property is the same, the difference is only in degree; and if this constitutional provision applies to any such laws, it necessarily prohibits all. For the attempted distinction between the "*essential characteristics*" of property and any of its incidents or qualities which are regarded as elements of its value, whether they "*constitute its main value*," or only a small part of it; and between laws which "subject" "certain classes to *some privations*," and laws which affect all classes, and involve great privations, there is no foundation in the constitution, whose protection and prohibition are general, nor, I respectfully submit in reason, which rejects distinctions when it fails to perceive differences. The validity of such laws rests upon no restricted

Wynehamer v. The People.

construction of this constitutional provision, but upon a principle of the common law, older than constitutions, coeval with the earliest civilized ideas of property. That principle is, that every man shall so use and enjoy his own, as not to injure another, and especially that the use which he makes of his property shall not work a public evil. This is another *incident* to the right of property *as inseparable* from the title as the right of sale, or any other right of enjoyment annexed to it. The legislature which exercises the sovereign power of the state is clothed with the power and charged with the duty of promoting its prosperity, by regulating its internal commerce, and holding out suitable encouragement to the industry of its citizens, of preserving the public peace, by preventing and punishing crime, and guarding the health and morals of the people, by such laws and regulations as in its judgment may seem likely to promote these objects. *Subject only to the limitations prescribed by the constitution*, the powers of the legislature for these purposes are unlimited. In the choice of the means its discretion is plenary. If, in its judgment, the trade in any article is incompatible with, or dangerous to any of these objects of its protection, that trade may be regulated, restricted or *prohibited in the discretion of the legislature*. It is admitted that the sale may be *controlled*, but it is claimed that it can be done "*only so far*" "*as to prevent abuse.*" According to this proposition, if abuse should be found inseparable from, or so generally attendant upon the exercise of the right, as to render the permission of the one, and the prevention of the other impracticable, the right to prohibit would necessarily follow. Whether this abuse is so intimately connected with this traffic is a question of fact, proper for the consideration of the legislature, in the exercise of its direction, to ascertain the necessity and determine the extent of its action; but this is an inquiry which the court can not entertain in considering a question of power. The foregoing propositions can not be more clearly illustrated or more powerfully enforced than they are in the language of Chief Justice Marshall, in *Brown v. Maryland*. In reply to the argument of the counsel

Wynehamer v. The People.

for the state, in favor of the power there claimed, to lay duties on imports, or to require importers to procure licenses from the state to sell their imports, in which it was urged that the states would not be likely to impose such terms as to discourage or diminish importation, the chief justice said—"It is obvious that the same power which imposes a light duty can impose a heavy one, one which *amounts to prohibition*. Questions of power do not depend on the degree to which it may be exercised. If it *may be exercised at all*, it must be exercised *at the will of those in whose hands it is placed*. * * * The question is, *where does the power reside, not how far will it be probably abused*. The power claimed by the state is, in its nature, in conflict with that given to congress, and the greater or less extent in which it may be exercised, does not enter into the inquiry concerning its existence."

The law of this state, which was superseded by the act in question, was probably as favorable an illustration of the exercise of the *regulating* power as could be instanced. I understand both of the learned justices, whose opinions are above quoted, to concede the validity of its provisions. And yet a slight consideration of its practical effect will show that the alleged "absolute and inherent rights" of the owners of this property did not escape the obnoxious effect attributed to the law in question, but that on the contrary it interrupted their enjoyment and impaired "their value." It prohibited all but a "selected class" from selling in less quantities than five gallons, and thus not only "interrupted," but *destroyed* the right to that extent. It circumscribed the market, and decreased the demand for the article to a certain extent, and thus "impaired its value" to the same extent. Similar illustrations might be drawn from our quarantine and health laws, and the police and other regulations of municipal corporations. But I propose to pursue the history of legislation on this subject, and to examine briefly some of the adjudications upon the laws of other states. By the law of Massachusetts, under which one of the license cases arose, all persons were prohibited from selling liquors in quantities less than twenty

Wynehamer v. The People.

eight gallons, without a license, and the act contained a provision that the commissioners of excise should in no case be compelled to grant a license. This law it will be seen exercised the power of *regulation* to an extent approaching very nearly to *practical prohibition*. The law of Rhode Island, under which another of those cases arose, contained a provision similar to that of the Massachusetts law, fixing the minimum quantity that might be sold without a license, at ten gallons. The law of New Hampshire went still further, and prohibited *all sales* without a license. There was no provision in the law under which licenses to any extent could be procured as a matter of right. The power of granting and refusing licenses was to be exercised in the discretion of the officers, designated for that purpose. It will be seen that *absolute prohibition* might result from the operation of this law. That this was the design of the law, and the effect of its operation in a great majority of cases, no one can doubt. That all of these laws contained unusually stringent restrictions upon the sale of liquor; that they seriously interrupted the enjoyment and impaired the value of the right of sale, no one will deny; but whether the right, in the language of Justice Strong, was even "essentially preserved" by the New Hampshire law, might well be doubted. As was natural, these laws encountered sturdy opposition from the interests so seriously affected by them. They were subjected to the most searching judicial scrutiny, and their validity was affirmed by the Supreme Courts of the respective states. The constitution of each of those states contained the same prohibition against depriving citizens of their property, "without due process of law," as is relied on in this case; and yet it is a remarkable fact, that in all the discussions which these cases underwent in the state courts, this objection was not suggested. The question, as we have seen, which was argued in the Supreme Court of the United States was, whether those laws were in conflict with those of congress, regulating commerce. The question now under consideration could not arise in that court, and for that reason the decided opinions of the chief justice and other members of the

Wynehamer v. The People.

court, in favor of the right of the states to prohibit entirely the domestic traffic in liquor, can not be regarded as authority in the strict sense of the term on this point. But the construction by that court of the state laws, which in their terms comprehended *all liquors*, limiting their application to the domestic trade for the purpose of maintaining the validity of those laws, shows the high sense entertained by that court of the importance of preserving in its utmost latitude the power of the states to control by restrictions or prohibitions its domestic trade. A legislative recognition of the same principle equally significant, is found in the excise laws passed by congress in 1794 and 1813, each of which contained a proviso that no license to sell liquor should be granted under the law to any person who was prohibited from selling by the laws of any state.

Another instance of the exercise of this power of regulation to the extent of *absolute prohibition* is furnished by the embargo law passed by congress in 1807, which prohibited all *importation* and *exportation* to or *from any foreign country*. The laws were by their terms unlimited as to the time of their duration and were maintained in full force for nearly two years. It was objected to them that the constitutional power to regulate commerce under which the law was passed did not authorize congress to *destroy* commerce as those acts confessedly did. The question was raised in the District Court of the United States, for the district of Massachusetts in the case of the *United States v. The Brigantine William*, (2 *Hall's Law Journal*, 253,) in which a libel was filed to enforce a forfeiture of the vessel for being engaged in the exportation of merchandise in violation of those laws. It was argued in behalf of the claimant that the acts of congress were utterly void; that there was not only an entire want of power in the constitution to prohibit commerce, but that the act was in direct violation of the grant of power to regulate, which necessarily implied the duty of preserving the thing to be regulated. The court held the law to be constitutional. Davis, district judge, in an elaborate opinion, examined the question in all its bearings,

Wynehamer v. The People.

In discussing the questions as to the nature and extent of legislative power, and the *restrictions upon it which could be enforced by the judiciary*, the learned judge said, "*affirmative provisions and express restrictions contained in the constitution* are sufficiently definite to render decisions, probably in all cases, satisfactory, and the interference of the judiciary with the legislature, to use the language of the constitution, would be reduced to 'cases' easily to be understood, and in which the superior commanding will of the people, who established the instrument, would be clearly and peremptorily expressed. To extend the censorial power further, and especially to extend it to the degree contended for in the objections under consideration, would be found extremely difficult, if not impracticable in execution. To determine where the legitimate exercise of discretion ends, and usurpation begins, would be a task most delicate and arduous. Before a court can determine whether a given act of congress, *bearing relation to a power with which it is vested*, be a legitimate exercise of that power or transcend it, the degree of legislative discretion admissible in the case must first be determined. *Legal discretion is limited.* * * * * Political discretion has a far wider range. It embraces, combines, and considers all circumstances, events and projects, foreign or domestic, that can affect the national interests. *Legal discretion has not the means of ascertaining the grounds upon which political discretion may have proceeded.* It seems admitted that necessity might justify the acts in question. But how shall *legal discussion* determine that *political discretion*, surveying the vast concerns committed to its trust, and the movements of conflicting nations, *has not perceived such necessity.*" Speaking of the objects for which this power may be exercised, the learned judge said, "the mode of its management is a consideration of great delicacy and importance, but the national right or power, under the constitution, to adapt regulations of commerce to other purposes than the mere advancement of commerce, appears to me unquestionable." The late Justice Story, in commenting upon this provision of the constitution, and in the same connection on the embargo laws,

Wynehamer. v. The People.

and the question involved in the case just cited, says: "No one can reasonably doubt that the laying of an embargo, suspending commerce for a limited period, is within the scope of the constitution. But the question of difficulty was, whether congress, under the power to regulate commerce with foreign nations, could constitutionally suspend and interdict it, wholly, for an unlimited period, that is by a permanent act, having no limitation as to duration, either of the act or of the embargo.

* * * An appeal was made to the judiciary upon the question, and it having been settled to be constitutional the decision was acquiesced in, though the measure bore with almost unexampled severity upon the eastern states, and its *ruinous effects* can still be traced along their extensive sea-board.

* * * * Non-intercourse and embargo laws are within the range of legislative discretion; and if congress have the power for purposes of safety of preparation or counteraction, to *suspend* commercial intercourse with foreign nations, they are not limited as to *duration*, any more than as to the manner and extent of the measure."

The effect of these laws upon private property was far more extensive and destructive than any that can possibly result from the law in question. The right to export property, designed and valuable only for that purpose, was one of those "essential and definitive characteristics which constituted its main value." The prohibition was "*destructive of its principal value*," and property of the value of many millions was rendered worthless by their operation. The constitution of the United States contains the same restrictions upon the legislative power of congress that is imposed by the constitution of our state upon its legislature, that no man shall be deprived of his property without due process of law. But in all the opposition which the embargo laws encountered, the objection that they violated this provision of the constitution occurred to none of its astute and able opponents.

The case of *The William* is a direct *authority* for the proposition that the national government, under the constitutional grant of power to regulate commerce, may restrict it *in its*

Wynehamer v. The People.

discretion, that such restriction may be carried to the extent of absolute prohibition, and that this power is not restricted to measures exclusively beneficial to commerce, but that it may be exercised as an instrument for other purposes of general policy and interest. These propositions may, in my opinion, be rested with equal safety upon the *authority* of this case, and the conclusive *reasoning* by which it is sustained. The powers of congress are enumerated in the constitution, and are expressly restricted to those so enumerated. The power in question is limited to commerce with foreign nations, and among the states. That the same power over internal commerce is reserved in all its amplitude by the several states, is not questioned, and that a state, by virtue of its powers of original sovereignty, which are merely limited by *specific restrictions* and not *enumerated* in its constitution, may, in the absence of such restrictions, exercise the same control over its domestic commerce, as that exercised by congress over foreign commerce, and for the same purposes, can not be doubted.

In view of this long-continued and uniform course of legislation, based upon the concurring authority of the general government and the several states, sanctioned by general acquiescence, and vindicated by judicial authority, whenever questioned, accompanied as such legislation has uniformly been, by cotemporaneous constitutional restrictions, identical with the restriction now invoked against this law, the question as to a conflict between the law, in the respect now under consideration, and the constitution, must be regarded as settled.

The prohibition in this act, as I have remarked, does not affect the possession of the property. It does not interfere with the right of sale, except within the state, and notwithstanding this prohibition, those interested in this property may manufacture and export it for sale elsewhere. I say notwithstanding this prohibition, I am aware that there are provisions in this act which were perhaps designed, and which may possibly be construed to prevent this. The provision that it shall not be *kept* in any place, except a dwelling house or church, has been

Wynehamer v. The People.

cited with others, supposed to evince a destructive purpose towards this property, which are alleged to be plainly repugnant to the constitutional rights of the citizen. But the defendant has not been prosecuted, nor has his property been proceeded against under these provisions. When he is indicted for *keeping* liquor, in violation of this act, or proceedings are instituted to enforce a forfeiture of his liquor, for any such cause different questions will be presented. With those questions we have nothing to do in this case. When they are legally presented for our consideration, the parties interested in them will be entitled to the deliberate and unbiased judgment of the court upon them. But to secure this, it is not only proper, but indispensable, that the parties interested, instead of the court, should be first heard. The legislature have said that the defendant shall not sell intoxicating liquor in this state. He has chosen to disregard that injunction, and has been convicted of an offence against the law. He disputes the right of the legislature to pass the law, and this question we are called upon to decide, nothing more. With the questions as to the wisdom, policy and propriety of the law which were discussed with so much zeal by the defendant's counsel at the bar, we have nothing to do. Those are questions addressed exclusively to the discretion of the legislature. This is a mere question of power. If the power which the legislature has assumed to exercise exists, and the law is plain, the duty of the judge and the citizen is the same, that of simple obedience. To both alike it speaks the language of command, and not of persuasion. I know of no principle recognized by the constitution, or resulting from any sound theory of government, which requires or authorizes the judiciary to interfere between the legislature and the people to shield the latter from the consequences of an improvident or capricious use, or even a positive abuse of legislative power. The remedy for such abuses, if they exist, is in other hands. It rests with the people, who in their constitution, have established the only restrictions upon legislative power that can be judicially recognized or practi-

The People v. Fisher.

cally enforced, except by those in whom the ultimate powers of sovereignty reside.

The judgment of the Court of Sessions should be affirmed.

SUPREME COURT. Monroe General Term, December, 1855.

Selden, Johnson and Welles, Justices.

THE PEOPLE vs. JOHN FISHER.

By the 5th section of the act "to prevent intemperance, pauperism and crime," passed April 9, 1855, the several officers therein mentioned are invested with the same powers, in relation to offences under that act, with which Justices of the Peace are clothed in criminal cases, and are each required to hold courts of Special Sessions for the trial of offences under that act, with the same powers in reference to such offences as courts of Special Sessions possessed, in regard to cases within their jurisdiction, as they were constituted when the act was passed.

Where a person charged with a violation of that act is brought before one of the magistrates mentioned in such 5th section, it is the duty of such magistrate to hold a court of Special Sessions and to try the person charged, as soon as the complainant can be notified, and the person charged has not the right to give bail to appear before the next criminal court at which there shall be a grand jury.

This provision of the act is not in contravention of the state constitution, which declares that "the trial by jury" in all cases in which it has been heretofore used shall remain inviolate forever.

The words "trial by jury" in the state constitution mean a trial by a common law jury of twelve men.

The expression in the state constitution, "the trial by jury," refers as well to other incidents of the trial, as to the number of men necessary to constitute a jury, and implies an indictment by a grand jury and in a court of record with common law jurisdiction.

m

Certiorari to the county judge of Monroe county.

On the 9th day of August, 1855, the appellant was brought before S. W. D. Moore, Esq., police justice of the city of Rochester, upon a warrant issued by said justice, charged with a violation of the act entitled "an act for the prevention of intemperance, pauperism and crime," passed April 9th, 1855.

(a) *Sed vide* The People v. Toynbee, in the Court of Appeals *infra*.

The People v. Fisher.

On being brought before the justice, he offered to give bail at the next criminal court having cognizance of the offence. The justice was satisfied with the responsibility of the bail so offered, but refused to receive it or to take any bail. Thereupon, on the 11th day of August, 1855, the appellant presented his petition to H. Humphrey, Esq., county judge, &c., and obtained the allowance of a writ of habeas corpus in order to be let to bail and be discharged from custody.

On the same day the officer made a return to said writ, and the same was traversed by the affidavit of the appellant and the issue was joined thereon.

On this issue evidence was taken to contradict the return. After hearing the case and arguments of counsel, the county judge decided not to let the defendant to bail, and ordered him remanded into the custody of the police constable, to be tried before a court of Special Sessions.

On the 17th day of August, 1855, the defendant sued out a writ of certiorari, removing the proceeding and adjudication of the county judge into this court to be reviewed.

Henry Hunter for the defendant.

J. W. Stebbins for the people.

By the Court, WELLES, J.—The fifth section of the act entitled “an act to prevent intemperance, pauperism and crime,” passed April 9th, 1855, is in the following words:—

§ 5. Every justice of the peace, police justice, county judge, city judge, and in addition, in the city of New York, the recorder, each justice of the marine court, and the justices of the district courts, and in all cities where there is a recorder's court, the recorder, shall have power to issue process, to hear and determine charges, and punish for all offences arising under any of the provisions of this act; and they are each hereby authorized and required to hold courts of Special Sessions for the trial of such offences, and under this act, to do all other acts and exercise the same authority that may be done or exercised by justices of the peace in criminal cases, and by

The People v. Fisher.

courts of Special Sessions as the same are now constituted; and the term magistrate, as used in this act, shall be deemed to refer to and include each officer named in this section. Such court of Special Sessions shall not be required to take the examination of any person brought before it upon charge of an offence under this act, but shall proceed to trial as soon thereafter as the complainant can be notified; and for good cause shown he may adjourn from time to time, not exceeding twenty days. At the time of joining issue and not after, either party may demand a trial by jury, in which case the magistrate shall issue a venire and cause a jury to be summoned and empaneled, as in other criminal cases in courts of Special Sessions. The complainant may appear upon such trial upon behalf of the people, and prosecute the same with or without counsel. He may also prosecute the same in all the courts to which, as hereinafter provided, appeal may be taken by attorney, or he may apply to the district attorney, whose duty it shall be upon such application to appear and conduct said appeal from the judgment thereon. The same costs and disbursements shall be allowed against the defendant upon such appeal as are now allowed in civil actions, to those courts to which appeal may be taken according to the provisions of this act. In all cases, if the district attorney shall appear and conduct the trial or appeal, or both, the cost, if any, shall go to him for his individual use; in other cases to the complainant; and in default of the payment of the whole or any part thereof the defendant may be committed to the same extent as provided in the fourth section of this act.

By this section the several officers therein enumerated are invested with the same powers in relation to offences under the act of which it constitutes a part, with which justices of the peace are clothed in criminal cases, and are required to hold courts of Special Sessions for the trial of offences under the same act, with the same powers in reference to such offences as courts of Special Sessions possessed as they were constituted when the act was passed, in reference to the cases within their jurisdiction.

The People v. Fisher.

By the Revised Statutes the power of courts of Special Sessions are confined to cases where the party charged with an offence requests to be tried before them, or, where he shall not so request, but shall after being required, omit for twenty-four hours to give bail for his appearance at the next criminal court having jurisdiction, &c., (2 R. S., 711, §§ 5 and 3.) But the section of the prohibitory act referred to, does not, as the Revised Statutes do, restrict the power of the courts of Special Sessions to cases where the party charged either requests to be tried by such court or omits to give bail. It certainly does not do so in terms, nor, as I think, by just or fair implication; but on the contrary it seems to contemplate that the justice or other officer before whom the person charged shall be brought by virtue of the process, shall proceed at once to the trial of the charge.

Power is expressly conferred upon the officers mentioned to issue process, to hear and determine charges and punish all offences against the provisions of the act, and for that purpose they are each authorized *and required* to hold courts of Special Sessions for the trial of such offences. Such court is not required to take the examination of any person brought before it upon charge of an offence, "*and shall proceed to trial as soon thereafter as the complainant can be notified.*" The section then proceeds to give directions respecting adjournments, and provides for a jury on the demand of either party, if applied for at the joining of issue. It then concludes with some regulations and provisions respecting appeals from judgments of the courts of Special Sessions provided for in the 8th section of the act, and the costs in such appeals.

It will be perceived, not only that the magistrate has conferred upon him the power to try the person charged, but that he is imperatively required to hold a court of Special Sessions, and proceed to the trial as soon as the complainant can be notified. Neither his power or duty to try is made to depend upon the defendant's request to be tried, his omission to give bail or any other condition. That the power of courts of Special Sessions, in the cases provided for in the Revised

The People. v. Fisher.

Statutes, is thus limited and dependent, and in the act under consideration, acts which, before its passage, were innocent to the eye of the law, are made misdemeanors, their punishment defined, these tribunals erected and provided expressly for their trial and punishment, with directions concerning their manner of proceeding, and no mention made of any such condition or restriction of their powers, is strong evidence to my mind that none such were intended to be imposed. Instead of the conditions provided in the Revised Statutes, these courts, in cases arising under this act, are directed to proceed at once to the trial of the persons charged with a violation of its provisions.

It is contended, however, in behalf of the appellant, that if the intention of the act was to compel the person arrested by virtue of the process issued by a magistrate, to be tried before a court of Special Sessions, without the right on his part to be released from custody upon giving bail to appear at the sessions, the act is so far in contravention of §2, of art. 1 of the constitution, which declares that "the trial by jury, in all cases where it has been heretofore used, shall remain inviolate forever." I entertain no doubt that by the words "trial by jury" as there mentioned, was intended a common law jury, which consists of twelve men. But I am satisfied it was not intended to apply to a case like the present.

Section six of the same article provides that "no person shall be held to answer for a capital, or otherwise infamous crime (except in cases of impeachment and in cases of militia when in actual service, and the land and naval forces in time of war, or which the state may keep with the consent of congress in time of peace; and in cases of petit larceny under the regulation of the legislature,) unless on presentment or indictment of a grand jury," &c.

The framers of the constitution have here declared that persons charged with capital or otherwise infamous crimes, shall not, with certain exceptions, be held to answer therefor, except by indictment or presentment of a grand jury, clearly, as it seems to me, leaving all other cases under the regulation of the legislature.

The People v. Fisher.

Persons charged with crimes not capital or otherwise infamous, may therefore be held to answer without being first indicted or presented by a grand jury, as the legislature shall provide.

But it is said that in whatever court the person charged may be tried, and whether with or without being presented by a grand jury, he is, in any event, entitled to have his guilt or innocence determined by a jury of twelve men.

The several written constitutions of this state, those of 1777, of 1821, and of 1846, contain substantially the same provisions as those above referred to. By section four of the act declaring the powers and duties of justices of the peace, passed April 13th, 1813, (2 R. S. 507,) petit larceny, misdemeanor, breach of the peace, or other criminal offence under the degree of grand larceny, was triable by a court of Special Sessions, and *that* without any jury whatever. This continued until 1824, when the legislature so far modified it as to give the party accused the right to be tried by a jury of six men. (*Laws of 1824, ch. 238, § 47.*) By the Revised Statutes, the causes triable by courts of Special Sessions are mentioned and are contained in eight specifications, all being below the degree of grand larceny, and none of them being what would be denominated infamous, in the sense of the constitution, except petit larceny. (2 R. S. 711, § 11.)

The section of the constitution which it is claimed secures to the appellant a trial by jury of twelve men, uses the expression "*the trial by jury.*" This refers as well to all other incidents of the trial as to the number of men necessary to constitute the jury. It means, as I think, such a trial as is contemplated by section six, for persons charged with capital or otherwise infamous offences, which must be upon presentment or indictment of a grand jury, and in a court of record with common law jurisdiction.

I think it is apparent from several considerations:

1. A common law jury trial can only be had in a court of common law jurisdiction, both as regards the character of the court, and its mode of procedure. It is not true that simply

The People v. Fisher.

making the jury to consist of twelve men, constitute a common law jury trial.

2. Section 6th excepts from its operation petit larceny, which at common law was felony, and infamous in its character. The statute of 1813, and the Revised Statutes referred to, expressly authorized courts of Special Sessions to try for that offence, which was never held to be in contravention of the constitution, (*Murphy v. The People*, 2d Cow. R. 815; *The People v. Goodwin*, 5th Wend. R. 251.)

3. The 2d and 6th sections referred to, are parts of the same articles of the constitution, and are *in pari materia*; the latter, securing to all persons charged with infamous crimes excepting as aforesaid, a trial after due presentment or indictment by a grand jury, leaving the trial of all cases of misdemeanor on the footing of petit larceny to be provided for by the legislature by a jury of six, twelve or any other number, or without a jury.

4. No jury trial in criminal cases was ever known to the common law, but such as followed upon indictment in a common law court, after the accused was in custody, had been arraigned and had plead to the indictment.

5. This construction makes the two sections harmonious and sensible. The legislature may declare criminal, acts which before were innocent, as in case of the statute under consideration. How can it be said that in such cases a jury trial has been *heretofore used*? Section two is expressly limited to cases in which the trial by jury *has been heretofore used*. In cases of acts made criminal by a statute passed after the adoption of the constitution, no trial either with or without a jury has been used. But if an act is made a felony by statute and thereby becomes infamous in its character, as in the cases of of the statute to prevent abduction of females for purposes of prostitution, and to prevent seduction, section sixth secures to the person charged with its violation a trial by jury, after due presentment by a grand jury. 2

6. Section two only requires a trial by jury, in cases where it has been heretofore used. This can not mean cases where

The People v. Fisher.

it might or might not be required, for then no misdemeanor could be tried by the Special Session, as every person charged with any crime was liable to be indicted therefor by the grand jury, and then a trial by jury was the only one which could follow. The only practicable interpretation is to exclude from its operation those cases where it was competent to try by a court of Special Sessions, and where such trials had been in use. By the revised laws of 1813, before cited, all offences under the degree of grand larceny might be tried in those courts, and that law continued in force until 1830, when the Revised Statutes limited the jurisdiction of courts of Special Sessions to certain specified cases. The constitution has been twice revised since 1813, and the provisions on the subject have been continued substantially the same as they were before 1813. It would be singular, not to say absurd, if the organic law is to vary in its principles, and the objects to which it relates, at every or any change of legislation. It should be interpreted in this respect in the same way as if there had been no revision since 1777. The fact that the same thing has been twice asserted since that time in the same solemn manner, certainly ought not to change the interpretation, justly applicable to it originally, but on the contrary, should confirm such interpretation.

For the foregoing reasons, I am of the opinion that the decision of the county judge was correct and should be affirmed.

SELDEN and JOHNSON, justices, concurred. Ordered accord-

SUPREME COURT. Saratoga General Term, December, 1855.
C. L. Allen James and *Bockes*, Justices.

THE PEOPLE *vs.* FRANK QUANT.

The legislature of this state has the power to enact a law prohibiting the sale of intoxicating liquors, and to provide penalties for its violation.

The act of April 9, 1855, so far as it prohibits the sale of intoxicating liquors, imposes penalties for its violation and provides for their enforcement, is not in conflict with the constitution of the United States or of this state.

Foreign liquor, after it has passed beyond the hands of the importer, or after the original package has been broken for use or sale, is not exempted from the operation of the statute by the last clause of the first section of the act.

Those sections of the old excise law, which prohibited the sale of all liquors in quantities less than five gallons without license, are not repealed by the act of 1855, but still remain in force.

The facts of this case are sufficiently stated in the opinion of the court.

D. P. Corey, for the people.

James Finlayson, for the defendant.

By the Court, JAMES, J.—The defendant, Quant, was arrested and brought before a justice of the peace of Montgomery county, charged with a violation of the first section of the act passed April 9th, 1855, entitled “an act for the prevention of intemperance, pauperism and crime.” A motion was made to quash the warrant of arrest, for irregularity, which was denied. A complaint was then exhibited against the defendant, charging him with selling intoxicating liquors; keeping them with intent to sell; giving away such liquors, and keeping them with intent to give away, &c. The defendant took issue upon the complaint, and the cause proceeded to trial before a justice, as a court of Special Sessions, with a jury. The fact of selling gin, whiskey and beer, at various times, to be drunk in his house, and of keeping it for the purpose of sale, was clearly

The People v. Quant.

and distinctly proved; the jury found the defendant guilty, and the court adjudged him to pay a fine of \$50 and costs. From that conviction and sentence this appeal is brought.

The important questions which arise on this appeal are the constitutionality of the prohibitory feature of the act of April, 1855; whether foreign liquors are exempted from its operation, and whether any portion of the old excise law is still in force.

If the prohibitory feature of the act of 1855 be unconstitutional, it must be by reason of its conflict with some provision of the constitution of this state or the United States. To a correct appreciation of this question, it is important that the difference in character between the state and national constitutions should be understood and remembered. The constitution of the United States consists only of powers delegated by the states and by the people of the states; and powers not thus delegated, or necessarily implied, or prohibited by it to the states, are reserved by it to the states respectively, or to the people thereof. (*10th amendment U. S. Con.*) The right to regulate commerce with foreign nations was one of the powers delegated.

First.—So far as the constitution of the United States is concerned, I consider the question conclusively settled by the cases in the *5th How. U. S. Rep.*, p. 504 and subsequent pages. Those cases seem to cover the whole ground. One of those cases involved the constitutionality of the liquor law of New Hampshire, which entirely prohibited sales. These cases were twice argued by able counsel, and each judge delivered his own opinion, and the decision was unanimous that the law was constitutional, and that it was legitimately within the province of the legislature to enact it. The chief justice in his opinion, said, "The power of congress over commerce does not extend further than the regulation of it with foreign nations and among the several states; that beyond these limits the states have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the general government. Every state, therefore,

The People v. Quant.

may regulate its own internal traffic, according to its own judgment, and upon its own views of the interest and well being of its citizens." Again, "If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I can see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy it is not my province or my purpose to speak. Upon that subject each state must decide for itself. I speak only of the restriction which the constitution and laws of the United States have imposed upon the states." (*See also 7 How. U. S. Rep.*, 283; *11 Pet.*, 102; *1 Kent. Com.*, 391.)

Second.—Does the prohibitory feature of the said act of April, 1855, conflict with any provision of the state constitution? This question may properly be classed under two heads. 1st. The power of the legislature. 2d. The restriction of the constitution.

1st. As to the power of the legislature. The constitution of this state is not a grant of power. It was created by the people in their sovereign character, and is a restriction upon the powers which the legislature would otherwise possess by the common law were there no constitution. The acts of that body within the restrictions imposed by that instrument, "are as absolute and uncontrollable as the laws flowing from the sovereign power under any other form of government. (*1 Kent. Com.*, 448.) This is a representative government, and when the representatives of the people, in their legislative capacity, enact a statute, it is the sovereign will declared by the proper authority of a legally constituted government. Such act, unless in conflict with the constitution, is the law of the state, binding upon the citizens and the courts. In *Cochran v. Van Surlay*, (20 *Wend.* 381,) Senator Verplanck remarks, "it is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interpretation, except so far as the express words of a written constitution give that authority. There are indeed many *dicta*, and

The People v. Quant.

some great authorities holding that acts contrary to the first principles of right are void. The principle is unquestionably sound as the governing rule of a legislature in relation to its own acts, or even those of a preceding legislature. * * * But I can find no authority for a court to vacate or repeal a statute on that ground alone."

In 5 *How. U. S. Rep.* above cited, Mr. Justice McLean says: "In all matters of government and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth and civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and when it shall cease, must mainly depend upon the evil to be remedied. To guard the health, morals and safety of the community, is one duty of government; to that end the laws of a state may prohibit the sale of property and *even authorize its destruction.*" "The lawgiver," says Chancellor Kent, "has the right to prescribe the mode and manner of using property, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of its citizens."

And in an opinion, by one of the ablest lawyers of this state, written to defeat the operation of this law, the principle was conceded "that the state legislature in its sovereign capacity may regulate property, and under this head may restrict and control its use, regulate the mode of sale, and even prohibit its use altogether. They may also direct its destruction at once and absolutely. But all this must be done, and can only be done, for some legitimate ulterior purpose within legislative competency. They may do all this, when necessary, for the preservation of life or health, of religion or morality. But in a free country, where property is protected under a paramount

The People v. Quant.

fundamental law, the necessity must clearly exist.” He there hinges his opinion on the question, whether the legislature or the court is ultimately to determine this necessity? He holds that the power rests with the court. In that I think him mistaken. The judiciary have no power or authority to declare void an act of the legislature solemnly passed, either on an assumed ground of natural equity or want of probable cause. (20 *Wend.* 381.) The courts can only declare an act of the legislature void, when it conflicts with the constitution. Any principle which would allow the judiciary to go further, and judge of the necessity for legislative enactments, and as they should deem them necessary or unnecessary, declare them valid or invalid, would place the people, in their representative capacity, subordinate to the judiciary, and the courts higher than the constitution. I can not subscribe to any such monstrous theory. The legislature must be its own judge of the necessity for such laws as it shall enact; there the power is reposed by the common law, recognized and sanctioned by the constitution, and unless its acts trench upon the provisions of that instrument, they become the law of the state, and are beyond the reach of judicial repeal. (*De Camp v. Eveland*, 19 *Barb.* 83, 93; *Hartwell v. Armstrong*, 19 *Barb.* 168-9.) If the legislature proved unequal to the trust, or violate the confidence reposed in them, the means of correction is to be found in our periodical elections. (19 *Barb.* 83.)

2d. Does that part of the present act under consideration, conflict with the constitution of the state? The ground of objection is thus stated by counsel: “This law destroys the second and sixth sections of article first of the state constitution, under which the rights and privileges of the citizen are secured, as well as his life, liberty and property,” and for other considerations the court are referred to that numerous catalogue of extrajudicial opinions, which have, since the passage of this law, been circulated in every portion of the state.

The second section of article I of the constitution, is as follows: “The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever.” Surely the

The People v. Quant.

principle of prohibition in no particular interferes with the right of trial by jury; and the right of trial by a common law jury of twelve men, by virtue of the constitution, never existed to persons guilty of offences below the grade of grand larceny, as I have endeavored to show in another case decided this same term.

That part of section six to which reference is made is as follows: "No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment by a grand jury; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law." It will be perceived that no part of this section has any application to the question presented by this appeal. That part of the act prohibiting the sale of intoxicating liquor, and providing penalties for its violation, creates no "infamous crime" as defined by our statutes; compels no one to be a witness against himself; nor deprives any one of life, liberty or property without due process of law. If other parts of the act conflict with this or any other section of the constitution, it will not affect the validity of those provisions free from such objections. (*Fisher v. McGin*, 1 *Gray, Mass. Rep.* 21.) By this, however, I do not mean to concede that any portion of the provisions of the act of April, 1855, are in conflict with the constitution. I only mean to be understood as confining myself strictly to the questions legitimately before the court.

One of the main arguments urged against this law is, that liquor is property, and as such, entitled to protection under the last clause of the section of the constitution above cited. That intoxicating liquor is property is freely conceded; it is so recognized throughout the act. The right to acquire, hold and traffic in property is recognized as a natural right, and when acquired is entitled to claim and receive protection from the law. Life, liberty and property, although entitled to protection, are each liable to forfeiture for a violation of the law. Thus, "If a man commit murder he forfeits his life; if he commit felony he forfeits his liberty; if he commit a misdemeanor he forfeits his

The People v. Quant.

property, by way of a fine." But this can only be done by due process of law. And what is due process of law? "Law is a rule of action prescribed by a superior and which an inferior is bound to obey;" and process of law is the mode of proceeding in the several courts prescribed by the law-making power. There is process by the common law, and process by the statute law. In the act of April, 1855, the mode of proceeding is provided by the law itself, and is by process of statute law. If the act, or any portion of it, is otherwise constitutional, the violators of such act or portion may be deprived of their property under its provisions, and it will be by due process of law.

Prohibiting the sale of liquor as a beverage does not destroy it as property. Its sale for mechanical, chemical and medicinal purposes is allowed by the act. It is true, that limiting and restricting the purposes for which liquor may be sold, may depreciate its price in the market; still, as property, it is physically untouched, and as useful as ever, for all other purposes. Although unconstitutional to pass laws depriving a citizen of his property, a law, the tendency of which is to reduce the price of a certain species of property in the market, will not for that reason be declared unconstitutional.

I have not been able, from the light afforded me by the counsel for the defendant, even with the aid of the numerous opinions to which the court were cited, to find the first section or clause in the constitution of this state, which, by word or implication, restrains the legislature from passing laws regulating or prohibiting the traffic in intoxicating liquors, and providing penalties for its violation; nor have I been able to discover that the prohibitory clause of the act under consideration conflicts with any of the provisions of that instrument.

Third.—It is next insisted that the conviction was wrong, because "it was not proved that the liquor sold or given away was not liquor the right to sell which in this state is given by any law or treaty of the United States." I had supposed the law well settled that "in an action for a penalty given by statute, it was not necessary for the prosecutor to disprove any qualification; that in such case the *onus probandi* lay upon the defendant."

The People v. Quant.

It was so held in *Potter v. Deyo*, (19 *Wend.* 361,) and the principle recognized in *Smith v. Joyce*, (12 *Barb. R.* 21, 26.) I regard such still to be the law; and in this case, if the liquor sold was for any reason privileged, the burden of establishing that privilege rested with the defendant.

But I deny that foreign liquor, when sold by any other than the importer in the original package, is by the act exempted from the operation of this law. The first section prohibits the sale of all intoxicating liquor except as provided by said act, and closes with these words: "This section shall not apply to liquor the right to sell which in this state is given by any law or treaty of the United States." It is under this clause that foreign liquor is claimed to be exempt. There is no express law or treaty of the United States which gives the right to sell liquor in this state. The right to sell is only claimed as incident to the right to import; and the United States Supreme Court held, that as the right to regulate commerce with foreign nations is vested solely in congress, and as under that right congress admits the importation of foreign liquor in packages, that while such importation continues in the hands of the importer, in the form and shape in which it was introduced, it continues a *part of the foreign commerce* of the country, and that the authority to import necessarily carried with it the right to sell in the form and shape in which it was imported; but when the original package was broken up for use or retail by the importer, or had passed from his hands into the hands of a purchaser, *it ceased to be an import*, and became subject to the laws of the state. This is all the law, or treaty, of the United States on the subject. This clause of section first was added to avoid conflict with this decision. But it is argued that the right to sell by the importer, even though it be in the original package, being conceded, it is liquor the right to sell which is given, and that being once exempted from the operation of the law, it so continues, no matter through how many changes it may afterwards pass. If such construction comported with the intent of the legislature,

The People v. Quant.

and fulfilled the purposes sought to be accomplished by the act, it might be adopted without doing violence to the language of that particular clause of the act. But it is apparent that such construction would be entirely foreign to the intent of the legislature, and operate to defeat the very object and purposes of the statute. In the construction of the statutes the intention of the maker is to govern, although such construction may seem contrary to the letter of the statute. (1 *Pet. Rep.*, 64; 2 *id.* 662; 15 *J. R.* 358; 3 *Cowen's R.* 89; 1 *Seld.* 562.) So in statutes penal, as well as others, an interpretation must never be adopted that will defeat the purposes of the act if it will admit of any other reasonable construction. (1 *Seld.* 562; 9 *Wheat.* 381.) Penal statutes are to be construed strictly, but not against the manifest intent of the legislature. (2 *J. R.* 379; 2 *Cow. Rep.* 410; 5 *Wheat.* 76; 8 *Pick.* 370.) If the general meaning and objects of a statute should be inconsistent with the literal import of any particular clause or section, such clause or section should be construed according to the spirit of the act, if the intent of the legislature be clear and manifest. (1 *Pick.* 248; 10 *id.* 235; 20 *id.* 267.) Remedial statutes are to be so construed, if possible, as to suppress the mischief and advance the remedy. (1 *Ham.* 206, 385, 481.) Many other authorities might be cited to the same effect. Whether or not the language used in the last clause of section first was the most clear and explicit that could have been adopted to enunciate the intent of the legislature, it is not now important to inquire. The intent is so apparent from the whole act taken together, that it can only be mistaken by the willfully blind. If the usual mode of construing statutes is adopted for the construction of this act, foreign liquors, after they cease to be "a part of the foreign commerce," are no more exempted from its operations than are liquors manufactured within the state.

Fourth.—It was further insisted that "the legislature had no power to prohibit the pursuit of any of the common avocations of life, or of any of the ordinary means of obtaining a livelihood." I have already said all that is necessary of legislative power. Before the passage of this act, the sale of

The People v. Quant.

intoxicating liquor, in quantities less than five gallons, unless the vendor had a license, was prohibited by law; and it is difficult to distinguish the difference between prohibition in the present law and the principle which lay at the foundation of the old excise law. The difference I apprehend is only in degree. Licenses to sell as a beverage are now prohibited altogether, while under the old law such licenses were permitted and a commission created which might issue them; but the commissioners were not bound to license. (1 *Hill's Rep.*, 655.) They might refuse, and sometimes did refuse; and when they did so, prohibition under five gallons was as complete within their jurisdiction as now. By the present act, the legislature has assumed to itself the discretion formerly vested in the board of excise, and said no license shall be granted. Prohibition was a prominent feature of the old law, and yet it was never, for that reason, deemed unconstitutional. It is true, the old law did not interfere with the traffic in quantities above five gallons, but that does not affect the principle. If it was constitutional for the legislature to prohibit the traffic in quantities less than five gallons, it most assuredly is in quantities over five gallons. The power existing, it may be exercised at such times and in such manner as the legislature shall see fit.

But supposing the act of 1855 void; the old excise law would then be left in full force. The defendant is shown to have sold gin, beer, and whiskey at different times to be drunk in his house. This he had no right to do under that law, without a license, and it is not pretended that he any such license. In such event he would be liable under the old law for a greater penalty than was imposed by this conviction, although entitled to a discharge from this particular proceeding. According to my understanding, certain sections of the old law still continue in force, notwithstanding the validity of the new statute. The act of April, 1855, only repeals those acts and parts of acts inconsistent therewith. Those provisions of the old law which prohibit the sale of intoxicating liquor without a license, are in no particular inconsistent with the present act, and therefore by the well-established rules of construction, they are not

The People v. Quant.

repealed. In the language of Justice Edmonds, "the several statutes operating upon the same subject being in *pari materia* are to be read together as one law, and they say no man shall sell without license, and no man shall have a license."

Several points preliminary to the principal questions were made by the defendant, none of which I deem well taken.

My conclusions from these premises are, that the legislature of this state has the power to enact laws prohibiting the sale of intoxicating liquors, and to provide penalties for their violation:

That the act of April 9, 1855, so far as it prohibits the sale of intoxicating liquors, imposes penalties for its violation, and provides for their enforcement, is not in conflict with any article or section of the constitution of the United States or of this state:

That foreign liquor, after it has passed beyond the hands of the importer, or the original package is broken for use or sale, so that it ceases to be foreign commerce, is not exempted from the operation of the statute by the last clause of section one:

That those sections of the old excise law, which prohibited the sale of all liquors in quantities less than five gallons without a license, are not repealed by the present act, but still remain in force.

The conviction and sentence of the Special Sessions should be affirmed.

COURT OF APPEALS. Albany, March, 1856. *Denio, A. S. Johnson, Comstock, Selden, Mitchell, Wright, Hubbard and T. A. Johnson, Judges*

JAMES G. WYNEHAMER plaintiff in error *vs.* THE PEOPLE defendants in error.

Intoxicating liquors, to be used as a beverage, are property in the most absolute and unqualified sense of the term : and as such as much entitled to the protection of the constitution as lands, houses, or chattels of any description.

All property is alike in the characteristic of inviolability, without reference to the question of its utility.

The prohibitions and penalties of the act "to prevent intemperance, pauperism and crime," pass the utmost boundaries of mere regulation and police, and by their own force, assuming them to be valid and faithfully obeyed and executed, work the essential loss or destruction of the property at which they are aimed. The act is therefore in violation of that clause of the constitution which declares that no person shall be deprived of his property "without due process of law," and is unconstitutional and void.

The terms "law of the land" and "due process of law," as used in the state constitution, are restraints upon legislation, and in all cases require a judicial investigation, not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question, whether, under the preexisting rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed.

The word "property" includes the power of disposition and sale, as well as the right of private use and enjoyment; and where a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is *deprived* of it, within the meaning of the constitutional provision.

The prohibitory act, in its operation upon property in intoxicating liquors, existing in the hands of any citizen of this state when the act took effect, is a violation of the provision in the constitution of this state, which decrees that no person shall be "deprived of life, liberty or property without due process of law," inasmuch as the various provisions, prohibitions and penalties of the act substantially destroy the property in such liquors.

Inasmuch as the act does not discriminate between such liquors existing when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant any defence based upon the distinction referred to, it can not be sustained as to any such liquor, whether existing at the time the act took effect or acquired subsequently.

Wynehamer v. The People.

It would be competent for the legislature to pass such an act as the one under consideration, (except as to some of the forms of proceeding to enforce it,) provided such act should be plainly and distinctly prospective as to the property on which it should operate.

The question whether "legislative power" is not limited beyond the restrictions specially declared in the constitution, discussed by COMSTOCK, J.

The plaintiff in error was indicted in the Court of Sessions of Erie county, and charged with having sold intoxicating liquor in small quantities contrary to the provisions of the prohibitory liquor act of April 9, 1855. Upon the trial, several exceptions were taken to the decisions of the court, involving the validity of the indictment, the regularity of the proceedings and the construction and constitutionality of the act.

Evidence was given on the trial tending to show that on several occasions between the 4th and 14th of July, 1855, the plaintiff in error had sold and delivered to divers persons brandy in quantities less than one pint at his bar in Buffalo, which was drank on his premises. After the prosecution had rested the cause, the counsel for the plaintiff in error asked the court to direct the jury to find a verdict of not guilty, on the following grounds:

1. That it did not appear that any offence had been committed by the defendant.
2. That the charges in the indictment were not proved.
3. That it did not appear but what the liquor, alleged to have been sold, was liquor the right to sell which was given by the laws of the United States.
4. It did not appear but that the liquor sold was imported into this country by the defendant from foreign countries, in pursuance of the laws of the United States.
5. That the first section of the act in question is in violation of the constitution of this state and of the United States and is void.
6. That the fourth section of said act is likewise contrary to said constitution and is void.
7. That the whole act is unauthorized by and in conflict with the laws and treaties of the United States and the constitution of the state of New York and is void.

Wynhamer v. The People.

8. That it does not appear but that the liquor sold by the defendant was authorized to be sold by the statute as above referred to.

The court overruled these exceptions and the defendant excepted.

The defendant's counsel then offered to prove that the liquor proved to have been sold by the defendant was imported into this state from foreign countries under and in pursuance of the revenue laws of the United States, and that the legal duties had been paid thereon. That the defendant purchased such liquors from the importer in the imported packages and sold to the persons and at the times proved by the witnesses for the prosecution.

This evidence was objected to by the counsel for the people and excluded by the court, to which decision the counsel for the defendant excepted.

The defendant's counsel then offered to prove that the liquors proved to have been sold by the defendant were had and owned by him on and before the 3d day of July, 1855. This was also objected to and excluded and the decision excepted to. The defendant was convicted and sentenced to pay a fine of \$50, and to stand committed until paid. On a writ of error, the judgment was affirmed in the Supreme Court sitting in the eighth judicial district. The decision in the Supreme Court is reported *supra* page 377. The defendant brought the case by writ of error to this court.

Amasa J. Parker, for the plaintiff in error, after discussing other questions of irregularity raised at the trial, made the following points on the merits.

IV. By the true construction of the first section of the prohibitory act, all imported liquors are exempted from its operation; and the court erred in excluding evidence that the liquor in question was imported liquor, and was purchased from the importer in the imported packages.

1. It is conceded that the *intention* of the legislature, legally

Wynehamer v. The People.

ascertained, is to govern in the construction of a statute, but that intention must be ascertained from the statute itself. "Courts of law can not consider the motives which may have influenced the legislature or their intentions *any further than they are manifested in the statute itself.*" (By SPENCER, J., in *People v. Utica Ins. Co.*, 15 *John. R.* 394; *Smith on Statutes*, § 505, 545; *Walker v. Harris*, 20 *Wend.* 561; 7 *Barn. & Cress.* 569.)

2. "It is not allowed to interpret what has no need of interpretation." *Quoties in verbis, nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* In the absence of ambiguity no exposition shall be made which is opposed to the express words of the instrument. (*Broom's Leg. Max.* 266; *Vattel, Book ii, ch. 17*, § 263; *Smith on Statutes*, § 505, 545; 13 *Mass.* 343; 1 *Kent. Com.* 462.)

3. Effect must be given, if possible, to every clause and sentence of the act. (*Smith on Statutes*, § 527; 7 *Barn. & Cress.* 569; *McKay v. Detroit Plank R. Co.* 2 *Mich. R.* 138.)

4. Penal statutes are laws in restraint of natural liberty, those which forbid anything not in itself unlawful, or inflict penalties or work forfeitures, and they are to be construed strictly. If the language will admit of two meanings, the court shall determine that the lawgiver intended that construction which will exempt the subject from the penalties and provisions of the act. (*Smith on Statutes*, § 468, 495, 738; 7 *Cowen R.* 252; 1 *Kernan*, 601.)

5. These rules have been disregarded in the judgment given in the Supreme Court. Applied to the act in question, the last clause of the first section exempts imported liquor from the operation of the act. "*This section shall not apply to liquor the right to sell which in this state is given by any law or treaty of the United States.*"

6. The revenue laws permit the importation of brandy in casks of not less than fifteen gallons capacity, and it has been decided by the Supreme Court of the U. S., that under the laws and treaties of the U. S., the importer has a right to sell his imports in the imported packages or casks, and that a state

Wynhamer v. The People.

law requiring the importer to take out a license to and pay fifty dollars therefor was void. (*Brown v. Maryland*, 12 *Wheaton*, R. 419.)

7. The right to sell imported liquor in this state, is thus given to the importer by the laws and treaties of the United States, under the constitutional provisions which give to congress the power to regulate commerce and prohibit a state from laying a duty on imports. This right is applicable to all imported liquor and to no other.

8. The language of the last clause of the first section is clear and explicit. There is in it no obscurity or ambiguity, and it "needeth not to be interpreted." It exempts a certain kind of property from the operation of the statute. If it does not mean imported liquor, it means nothing. No one has suggested any other meaning. The statute is highly penal, and liable to no fraud or loose construction.

9. The language of the exception is descriptive of a certain species of property. Its identification does not depend upon the length of time the right to sell under the U. S. laws may continue in this state. It continues long enough to designate the kind of liquor, and to distinguish it from all others.

10. The seventh section corroborates the view I have taken. It prescribes a rule of evidence upon the question whether the liquor is imported. The 22d section protects the liquor in the hands of the importer, and in selling in the original packages to a person authorized by the act to sell. So far as this goes, it harmonizes with the other exception. The last clause of the first section excepts imported liquor from the operation of that section. The clause in the 22d section excepts original packages in the hands of the importer from all the provisions of the whole act.

V. If imported liquor is not excepted from the operation of the statute, then we say the statute is void because it conflicts with the laws and treaties of the United States which authorize a sale. (*Const. U. S. art. 6, § 1.*)

1. If congress has power to regulate a subject matter, a state

Wynehamer v. The People.

can not interfere to oppose or impede such regulation. In such case, if a state law conflicts with the act of congress, the state law must yield, because the constitution says, that acts of congress passed within the scope of the constitutional power of congress are the supreme law of the land. (5 *How. R.* 573—4 *Ch. J. Taney*; 1 *Wheaton*, 304; 3 *id.* 309; 6 *id.* 384; 16 *Peters*, 530.)

2. In *Brown v. The State of Maryland*, the Supreme Court of the United States has decided that a state law conflicting with the free right of the importer to sell in the imported package was void, because it would render the imported article valueless.

To forbid a sale by the person buying from the importer would render the property equally valueless and would equally prevent importation.

3. A state may regulate the sale of imported property and may tax it like other property after it has passed from the hands of the importer, but it has no power to prohibit a sale. It can not accomplish indirectly what it is forbidden to do directly.

4. The license cases (5 *Howard Rep.*) do not contravene this doctrine. Those were cases of regulation, not of prohibition. They were so treated by counsel in the argument. (5 *How. Rep.*, 550, 551.) As to the New Hampshire case, it turned upon another point, viz: that congress had never exercised its constitutional power to regulate commerce between the states, the liquor not being in that case imported, but brought into New Hampshire from Massachusetts. The expressions in the opinions of some of the judges, that states might even prohibit the sale of imported liquor, after it had passed to the hands of a purchaser from the importer, are *obiter* and were not called for by the facts of the case.

5. It will not be denied but this statute is prohibitory. It aims to prevent the use of intoxicating liquor as a beverage. It enforces absolute prohibition. (*See Point VII.*)

VI. The prohibitory act is void because it impairs the "obligations of contracts" contrary to an express inhibition in the

Wynehamer v. The People.

constitution of the United States. (*Const. U. S.*, art. 1, § 10, sub. 1; *Story on Const.* § 1368 to 1393; *Smith on Stat.*, 250; *Dartmouth Col. v. Woodward*, 4 *Wheat.*, 578; 1 *Ohio State R.*, 638.)

1. This provision of the constitution is violated by an act affecting the tenure or title to property acquired under a contract, or interfering with the right to use and enjoy the property in any manner which was lawful at the time of acquiring title. (1 *J. J. Marsh*, 568; 6 *Cranch*, 135; 8 *Wheaton*, 91; 1 *Dana R.*, 488; 3 *Story Const.* § 1370.)

2. In this case the accused offered to prove that he came by the liquors by purchase.

3. The legislature has the power to regulate, but not the power to destroy or to prohibit it. It is like the control the legislature has over the remedy which it may exercise, provided it is not carried so far as to trench upon an existing or vested right. (4 *Wheat.*, 122; 2 *Kent. Com.*, 397; 1 *Kern. R.*, 281; 1 *Denio*, 274; 1 *Howard R.*, 311; 2 *id.* 608; 8 *Wheat.* 1; 11 *Penn.* 480.)

Our license laws regulated but did not prohibit the sale. In quantities above five gallons there was no restriction.

VII. The act in question is a violation of the provisions of the United States and state constitutions, which declare that "no person shall be deprived of life, liberty or property, without due process of law," and that "no member of this state shall be disfranchised or deprived of any of the rights and privileges secured to any citizen thereof unless by the law of the land or the judgment of his peers" and that no state shall pass any bill of attainder. (*Const. of N. Y.*, art. 1, § 1 and 6; *Const. of U. S.*, art. 1, § 10; *Amendments to Const. U. S.*, art. 5.)

1. It will not be denied but intoxicating liquors are property. "Spirits and distilled liquors are universally admitted to be the subjects of ownership and property, and are therefore subjects of exchange, barter and traffic," &c. (5 *How. R.*, 577, *Taney, Ch. J.*)

2. They are admitted to be property by the act itself, which

Wynehamer v. The People.

treats them as legitimate subjects of ownership. (1 *Curtis R.* 328-9; 33 *Maine R.*, 561-2.)

3. On the 3d day of July, Wynehamer was the owner of the property in question, enjoying all the rights incident to ownership. On the 4th day of July that same property was rendered valueless, by the *fiat* of the legislature, which deprived him of the power of sale.

4. But the act goes even farther. It leaves nothing to inference. By the twenty-fifth section, all liquor kept in violation of any provision of the act was declared to be a public nuisance. The property, with all its rights and incidents, is thus annihilated by legislative edict. On the third it had value and was protected by law. On the fourth its very existence became a crime. It had ceased to be property. A more palpable deprivation of property can not be conceived.

5. But it is said this is done by "due process of law." It is done without any process of law and by a mere legislative enactment. It is a gross usurpation by the legislature of judicial functions. Judge Green admits that liquor is property, that the right to sell property is one of its recognized legal incidents, and that "due process of law" means a trial and judgment in regular judicial proceedings. But in claiming the right to regulate the sale of property, he overlooks the fact that the property here with all its rights and incidents was obliterated by a mere legislative act.

6. The case recently decided in the fourth district (*The People v. Quant*) is put upon a still more dangerous ground. The alarming doctrine is in this case declared, that if the act is otherwise constitutional, the violaters of it may be deprived of their property under its provisions and it will be by due process of law. This is a startling proposition. It nullifies the constitutional restraint upon legislative power. It substitutes the will of the legislature for a regular judicial judgment.

7. The words "law of the land" do not mean a statute passed for the purpose of working the wrong. They mean by due course of law; by indictment or presentment of good and

Wynehamer v. The People.

lawful men. And "due course of law" means law in the regular course of administration through courts of justice. (*Coke* 2 *Inst.* 45, 50; 2 *Kent Com.* 13 and note to 7 ed.; 4 *Hill* 140, 145; 4 *Dev. N. C.* 15; 3 *Story on Const.* 661; 2 *Yerger*, 500, 554; 5 *Watts & Serg.* 173; 1 *Curtis* 325.)

In South Carolina the words "laws of the land" in the state constitution have been decided to mean the common and statute law existing in that state at the adoption of its constitution. (*State v. Simons*, 2 *Speers R.* 767.)

8. The act in question has the most objectionable characteristics of a bill of attainder. It forfeits, and confiscates the property of the citizen. (1 *Dana R.* 510; 6 *Cranch. R.* 137; *Story Const.* § 1338, 9; 1 *Curtis*, 337.)

9. The object of the prohibitory act is absolute prohibition of the use of intoxicating liquor as beverage. The whole scheme of the act is to adjudge liquor a nuisance. If that general scheme is unconstitutional and void, so are also all the means by which it is to be enforced. If any of the provisions necessary for accomplishing the object are invalid, the whole and every part of the act must fail. (*Newell v. The People*, 3 *Selden*, 9-23; 6 *Eng. (Ark.) R.* 500.)

10. The legislature has no constitutional right to adjudge property to be a public nuisance, and thus to place it beyond the pale of ownership and protection. The legislature can not deprive the citizen of that which the constitution says he shall have and enjoy.

A public nuisance is that which is inconvenient or troublesome to the whole community in general, and not merely to some particular person. (4 *Black. Com.* 167.) It is indictable but not actionable.

Now liquor "kept" can not be a nuisance. It is harmless of itself, nay, it is useful and is conceded to be, for certain purposes, by the act in question. It is no reason for declaring it a nuisance that it may be abused. So may every article of food and even cold water itself.

Whether an article is a nuisance is a judicial, not a legislative question, and it can only be ascertained "by due process

Wynehamer v. The People.

of law." (3 *Story's Const.* § 1338, 9; 4 *Devereux, R.* 1; 16 *Ohio, R.* 540; 7 *How.* 407.)

11. By a legislative sentence all liquor "kept" in violation of the act is condemned and ceases to be property. All the other provisions of the act are the means of enforcing this legislative judgment, and many of them, considered severally, are enacted in utter disregard of constitutional rights. (5 *Ark.* 506; 7 *Texas R.* 365.)

12. In addition to the unreasonable searches authorized and the seizure and confiscation of property without due process of law, the putting a person twice in jeopardy for the same offence, &c., &c., it violates in express terms that provision of the constitution which declares that "the trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever." (*State Const. art. 1, § 1.*)

This means a common law jury of twelve men. (2 *Kern. R.* 198, *Johnson, J.*) And "heretofore used," means used at the adoption of this constitution. Such was the meaning given by the Court of Errors, to the same words in the constitution of 1821. (*Duffy v. The People*, 6 *Hill*, 78.)

At the time of the adoption of the present constitution, there was not a single misdemeanor which could compulsorily be tried without a common law jury.

A few misdemeanors were triable by a court of Special Sessions, provided the accused elected to be tried; but there was not one in which he might not insist on a trial elsewhere by twelve men. (4 *Wheat. R.* 235.)

13. The constitutional protection extends to newly created offences as well as to previously existing offences. If not, the legislature is omnipotent, and there is no protection against its despotism. All cases in which it has been heretofore used means all cases of the same grade. All previous misdemeanors being triable by a common law jury, unless waived by the accused, a newly declared misdemeanor must bring the same right with it.

But if it were otherwise, it would not affect this particular case, for selling liquor contrary to law was a misdemeanor

Wynehamer v. The People.

when the constitution was adopted, and is made the same by this act. That particular misdemeanor was never before triable by a court of Special Sessions even by consent.

This is the first time in the history of this state, that the attempt has ever been made to compel a person to be tried even for a misdemeanor, before a court of Special Sessions, if he was willing to give bail to appear before a higher tribunal where he could have a common law jury.

Even in a civil case, no matter how trifling, it is not in the power of the legislature to deprive a party of his constitutional right of trial by jury.

In all criminal prosecutions the accused has a right to a speedy and public trial *by an impartial jury, &c.*, (*Bill of rights*, 1 R. S. 3d ed. 95, § 14; 6 Eng. R. 500; 1 Wash. R. 299.)

14. If I am wrong in this view, or if it is apparent that the legislature intended to give power to a magistrate to try this offence, then it follows that the legislature, having created a new offence and having especially authorized a certain tribunal to try it by conferring on it a new power, that tribunal has the exclusive power to try the offence.

Where a statute confers a right and prescribes adequate means of protecting it, the proprietor of the right is confined to the statutory remedy. (*Dudley v. Mayhew*, 3 Comst. 9, 15, 16.)

If an act has prescribed the remedy for the party aggrieved, and the mode of prosecution, all other remedies and modes are excluded. (*Miller v. Taylor*, 4 Burr. 2323; *McKeon v. Caherty*, 3 Wend. 494.)

Where a statute creates a new offence and gives a particular penalty, the party will not be punished by indictment. (*Rex v. Robinson*, 2 Burr. 803; *Watson's case*, 6 Mod. 86; *Castle's case*, Cro. Jac. 643; *People v. Stevens*, 13 Wend. 342.)

It follows then, that the prosecution *must* be before a court of Special Sessions and not by indictment.

15. It is no answer to this last argument to say that by section 23, grand juries are to be charged to inquire into

Wynehamer v. The People.

offences under the act. No jurisdiction can be obtained by inference. Besides, there is enough else under the act proper for their consideration, and which they may be presumed to have had in view in the nuisances declared by it, and the perjuries likely to be committed in its execution. It is quite significant of the exclusive intention of the legislature that it has given an appeal by either party from a judgment of the magistrate, and none from any judgment by a court of Oyer and Terminer or Sessions.

VIII. However extensive may be the power of the legislature over prospective acquisitions, it can never prohibit the use of property already acquired. That would destroy a vested right. In this case, Wynehamer owned the property before the act took effect. To declare such property forfeited, would be an *ex post facto* law and void. (33 *Maine R.* 559; *Const. U. S. art.* 1, § 10.)

IX. It is only the "legislative power" that the people have vested in the legislature. Even if there were not any express constitutional restriction, the legislature would have no power to pass this act. It is a violation of the settled maxims and principles of a free government. It is an invasion of natural right and the authorities are ample to show that such an act will not be enforced by the courts. (4 *Barb. R.* 71; *Barculo, J.* 2 *Peters R.* 657; 4 *Hill*, 145; 3 *Dallas*, 386; 4 *Devereux R.* 1; *Blackwell on Tax Titles*, 15, 16, 17, 21, 22; 1 *Dana*, 511; 1 *J. J. Marsh*, 566, 571; 1 *Ohio Stat. R.* 633; 3 *Dallas*, 388; 2 *Cranch*, 390.)

1. "Civil government is not entitled, in ordinary cases and as a general rule, to regulate the use of property in the hands of the owners, by sumptuary laws or any other visionary schemes of frugality and equality." (2 *Kent Com.* 329.)

2. It is a universally recognized theory of government that absolute and despotic sovereignty, which must exist somewhere in every organized political society, does, by our system remain with the people, and that the legislative power, which has been conferred upon government, is only such portions of that absolute sovereign power as is necessary to accomplish the design and object of government, which is the security and protection

Wynehamer v. The People.

of the persons and property of all the citizens. (1 *Lieber's Pol. Eth.* 188, 9, 194, 202; *Woodeson's Lec. upon Law; Vattel, Book* 4, § 45, 51; *Works of John Locke, vol. 5, ch. 11*; 1 *Ohio State R.* 633; 3 *Dallas*, 386; 6 *Cranch*, 87; 2 *Dallas*, 310; 4 *Hill*, 146; 2 *Kent Com.* 339; 2 *John. Ch.* 162; 4 *McLean*, 497; 3 *Story Const.* § 1393; 5 *Watts & Serg.* 174; 9 *Gill & J.* 408.)

3. Under these universally reserved rights we are to be protected against all sumptuary laws and all interference with personal rights. It is not in the power of the legislature to say what we shall eat or drink or wear, or to adjudge an article of property recognized as valuable and useful from the earliest ages, the use of which has been sanctioned by divine example, to be a nuisance and to make it criminal to keep, sell or give it away. (*Plin. Nat. Hist. Lib.* 14, c. 22; 2 *Herod.* 76; *Dion. Cassius, Lib.* 49; *Tacitus de Mor Ger.* c. 23; *Songs of Solomon*, 8, v. 12; *Psalms*, 104, v. 14 and 15.)

4. The power of police regulation authorizes the destruction of what is of itself noxious; but it does not authorize the destruction of what is in itself good, because a bad use may be made of it. The power of police regulation results from necessity, and is itself on the very verge of authority. This act goes far beyond it.

X. The indictment in this case is based upon, and can only be sustained under the act of April 9, 1855, called the "prohibitory act." It refers to the statute by its title and conclusion, and seeks to bring this case within that act alone. It can not be sustained under the Revised Statutes,

1. Because those laws are repealed.

2. Because the indictment is not within the words of the old statute and does not charge the offence created by that act. (*Bar. Cr. L.* 332, 333.)

It does not allege the selling of "strong or spirituous liquors or wines," nor "in quantities less than five gallons," nor that it was sold *without license*. The indictment would be bad on error or in arrest of judgment under the excise act. (*Wharton's Am. Cr. Law*, 815, 3d ed.; 24 *Pick. R.* 374; 15 *Verm. R.* 290-6 *Leigh*, 667.)

Wynehamer v. The People.

Albert Sawin for defendant in error.

First.—There is no law or treaty of the United States giving the right to the *importer* of liquors, or any other person, to sell the same in the original package or otherwise, in this state.

I. It is admitted there is no treaty or law of congress, in *express words*, authorizing the importer of brandy or distilled spirits or wine, upon payment of duties under the revenue laws of the United States to sell the same.

The acts of congress bearing on the question are as follows:

The first act of regulation of imports, passed March 2, 1799, vol. 1, sec. 103, p. 701 of United States Statutes at large, prohibits the importation of distilled spirits in less quantities than ninety gallons.

By act of 2d March, 1829, and of an act of 27th February, 1830, which are now in force, brandy may be imported in casks of a capacity of not less than fifteen gallons.

The last tariff act passed July 30, 1846, vol. 9, p. 44, schedule A of statutes at large, imposes a duty upon brandy of one hundred *per centum*, *ad valorem*.

II. The constitution of the United States and laws of congress authorizing the importation from foreign countries of distilled spirits, and imposing duties thereon, do not, *by implication*, give the right of sale of the same in this state to the importer or any body else.

1. There has been no adjudication of the Supreme Court of the United States to that effect.

The case of *Brown v. The State of Maryland* (12 Wheaton 410,) decided in 1827, arose under a state law prohibiting importers from selling "*without taking out a license for which they shall pay fifty dollars,*" and Chief Justice Marshall held the act repugnant to that clause in the constitution which declares "that no state shall lay any imposts, or duties on imports or exports." The question was one of taxation.

Afterwards, in 1847, the Supreme Court of the United States held that the laws of New Hampshire, Massachusetts and Rhode Island, regulating the sale of intoxicating liquors,

Wynehamer. v. The People.

were not inconsistent with the federal constitution, or acts of congress under it, and in doing so, all the judges expressly held one important portion of the opinion of Chief Justice Marshall in above case to be *obiter*, and three of them, Justices Daniel, Woodbury and Grier, substantially adjudged that so much of Chief Justice Marshall's opinion in the case of *Brown v. Maryland*, as held that state governments could not prohibit sales by the importer in the original packages, to be "not the point settled, or the *substantial reason* for it." (See 5 Howard, pages 505 to 633.)

III. But even if congress possess the right under their power to regulate commerce, to authorize the importer of foreign liquors to sell the same in this state, *that power has not been exercised*, and therefore, according to the unanimous opinion of the justices of the Supreme Court of the United States, in the above cited New Hampshire case, the legislation in this state does not conflict with that of the federal government.

It follows, therefore, that no construction can be given to the excepting clause under consideration, that would render the proof offered material; in other words, there is no liquor "the right to sell which in this state is given," either in express terms or by implication by any law or treaty of the United States.

The court will probably see from the examination of the other points presented below, that the decision of the first proposition is of no *practical* consequence in this case, yet it is peculiarly fit that the bar, and the courts, should upon all proper occasions, when satisfied that the precise question is yet open for argument in the Supreme Court of the United States; maintain the right of every state "to regulate its own *internal* traffic according to its own judgment, and upon its own views, of the interest and well being of its citizens."

Second.—Assuming, however, (as the legislature undoubtedly did,) that the federal judiciary have given such a construction to the law of congress as authorizes the importer of brandy to sell it within this state in the original cask or package, (not

Wynehamer v. The People.

less than fifteen gallons,) then the brandy charged in the indictment and proven to have been sold by the defendant, at his bar in quantities less than one pint, and drank on his premises, *is not the "liquor"* named in the last clause of said first section, within the intent and meaning of the exception.

I. Construing the clause by itself, adopting the most stringent rule of subtle and strict construction, ("the letter that killeth instead of the spirit that maketh alive.") It is submitted—

1. The words "*is given*" — the present tense, clearly limit the operation of the exception, as the technical words in an indictment "then and there" do—to the specified liquor charged in the indictment.

2. The words "*is given*" means "is granted in *express terms*."

3. The words "liquor the right to sell which is given by," are *equivalent* to the following words: "the sales of liquor authorized by."

4. There is no pretence under any construction by the Supreme Court of the United States, or any judge thereof, of any act of congress, that the right to sell liquor is attached to or flows with the liquor. "The right to sell which," is a right not "given" to the *liquor* but to the *person*. What person? The importer.

II. But if there is any doubt as to the meaning of the excepting clause, such a construction should be given to it as will put in force the intent of the lawmakers, which can be done only by limiting it to sales of liquor in the original packages by the importer.

This can be done in the application of well settled rules for the construction of statutes, *without adding to, or taking from, the whole act a single word, and at the same time give weight and meaning to every word therein.*

But it has been argued that penal statutes should be construed so strictly, as that the intent of the legislature should not be diligently sought out.

Wynehamer v. The People.

This pestilent dogma has no foundation in principle, and is not sustained by authority.

"However true it may in the general be, that penal laws are to be construed strictly, yet, even in the construction of them the intention of the legislators ought to be regarded." (Bacon's abridgment, title statute, cases, 1 *Durnford & East, Rex v. Hodnet*, p. 96; 3 *Rep.* 7; *Heydon's case*, 8 *Mod.* 65; 2d *Atkins*, 205.)

The statute declared it to be treason for a servant to kill his master. The court held, that applied to his master's wife. Croke, J., saying: "Notwithstanding that a statute which increases a punishment beyond what it was at the common law, ought not to be extended by an *equitable* construction, yet the words of such statute ought to be construed *according to the intention* of the makers of the statute.

So in the soldier's case, (*Croke C.*, 71). The statute making the departure of a soldier from his *captain* without license, felony. It was held by nine judges against three, that a departure of the soldier from his *conductor*, was within the meaning of the act.

That a penal statute when made for the public service and good of the king and realm, ought to be construed according to the intention of the makers of the statute.

So in *Poulter's case*, (11th *Rep.*, 35, 35,) it is said: "There are many cases in our books where penal statutes have been construed by *intendment* for the suppression of a mischief," &c.

Spencer, J., in delivering the opinion of the court in the case of *Sickles v. Sharp*, (13 *John.* p. 497,) says: "The rule that penal statutes are to be construed strictly when they act on the offender, and inflict a penalty, admits of some qualification."

In the construction of statutes of this description, it has often been held that the plain and manifest intention of the legislature ought to be regarded.

A statute which is penal as to some persons provided it is beneficial generally, may be equitably construed.

Wynehamer v. The People.

Even in case of felony, the courts have regarded the intention of the legislature.

A statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction. (2 *Brown*, 110, 111, 116.)

"Yet penal statutes are taken strictly and literally, only in the point of defining and setting down the *fact* and *punishment*, not in words that are but circumstances and conveyance in the putting of the case." (*Bacon's Maxims*, 51, 58, 59.)

Chief Justice Marshall says, (5 *Wheat.*, p. 76,) "Although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature."

Woodworth, J., in delivering the opinion of the court, in the case of *The People v. Bartow*, (6 *Cowen*, 293,) says, "Although a penal statute is to be construed strictly, the courts are not to disregard the plain intent of the legislature.

"Among other things it is well settled, that a statute which is made for the good of the public, ought although it be penal, to receive an equitable construction. When it is considered that this statute (the restraining act) was intended to strike at an existing evil, deemed to be of serious injury to the community, it can not well be doubted that its enactment was to promote the public good."

Justice Story, in the 1st of *Gallison's Reports*, page 118, says: "We are obviously bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by *strained* inferences.

"On the other hand we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and *mischief* to be within the *remedial* influences of the statute; and this is what I understand by expounding a statute liberally as to the offence."

Again in the 3d *Sumner's Reports*, p. 211, says the same judge in reference to penal statutes, "The proper course is to search out and follow the intent of the legislature, and to

Wynehamer v. The People.

adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature."

Justice Woodbury, in the *2d New Hampshire Reports*, p. 195, says: "A statute if of public utility, as the uniform presumption, should be so construed as to effectuate the intention of the makers. The intention, to be sure, is to be gathered from the language and *subject matter* of the statute. But when once so gathered, it is no less important to society, and no more severe upon the offender to enforce it in penal statutes than in remedial ones.

"Without such a construction, too, this class of statutes become almost a dead letter, prosecutions are a mockery and malefactors encouraged."

Chief Justice Parker, in the *8th of Pickering*, p. 370, says, (in relation to this rule, penal statutes must be strictly construed) "This did not exclude the application of *common sense* to terms made use of in the act, in order to avoid an absurdity which the legislature ought not to have been presumed to have intended. There were cases which showed this, *although precedents were not required* to sustain so reasonable a doctrine. (See *15 Wendell's Reports*, 147.)

A penal statute may also be a remedial law, penal in one part and remedial in the other. (*1 Wilson*, 126; *Douglass*, 702; *1 Selden*, 562.)

The foregoing citations furnish precedents, (if any were necessary) for the application of well established rules for the construction of *all* statutes, to the act for the suppression of intemperance, though it be called a penal statute.

1st.—The rule in *Heyden's case*. "What was the state of the law before the act?"

The law of the state granted licenses to sell intoxicating liquors in small quantities; and it was supposed the United States laws granted the right to sell in large quantities.

"What was the *mischief* against which the former law did not provide?"

Wynehamer v. The People.

The general use, especially in public places, of ardent spirits as a beverage.

"What remedy has the legislature provided by this act to cure the defect?"

The abolition of licenses for the sale of ardent spirits, and the prohibition of the sale of intoxicating liquors as a beverage.

"What was the true reason for the remedy?"

The "intemperance, pauperism and crime," resulting from its use.

The mischief, remedy and reason for the remedy are attached more strongly to imported liquors than home-made.

2d.—The rule in *Plowden*, 565. "A saving clause in a statute is to be rejected when it is directly repugnant to the purview or body of the act, and could not stand without *rendering the act inconsistent with, and destructive of itself*." (See 15 *Peters*, 445; 1 vol. *Kent's C.* 463.)

3. The rule that the intention of the lawgiver and the meaning of the law are to be ascertained by viewing the *whole and every part of the act*. (See *Broom's Legal Maxims*, p. 448, and opinion there cited by Justice Coleridge.)

Putting the first and twenty-second and fourth sections together, of this act, then the plain reading, "whoever shall sell intoxicating liquor, except liquor in original packages, the right to sell which is given by law or treaty of the United States to the importer thereof, shall be guilty of a misdemeanor."

4. The rule that all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the *fitness of the matter and person*. (*Bacon's Maxims*, Reg. 10; *Broom's Maxims*, 501; *id.* 140, 439.)

III. This act is not, so far as it bears on the case at bar, a penal statute within the meaning of the rule construing penal statutes strictly. It created no new offence and imposed no new punishment.

Wynehamer v. The People.

1. The selling of intoxicating liquors in this state, England and all civilized countries, has been for centuries the subject of penal legislation.

2. Instead of increasing the punishment for unlawful sales, it diminishes it, (provided our old excise laws are repealed by it.) Under the Revised Statutes, the overseers of the poor recovered from the seller twenty-five dollars for each sale under five gallons. In addition, for the same sale, the party was subject to an indictment; the punishment of which was both fine to the amount of two hundred and fifty dollars and imprisonment for one year in the county jail.

Third.—None of the provisions of the act for the suppression of intemperance, pauperism and crime, *applicable to this case*, the retail sale of intoxicating liquors at a tippling shop, and *this proceeding*, by indictment the “due process of law” of the constitution are repugnant to or in conflict with any of the provisions of the federal or state constitutions.

I. If they were, then the judgment of the courts below should be affirmed, because,

1. The 25th section of present act prohibits the granting of licenses.

2. The other provisions of excise act (1 R. S. 681,) are not in terms repealed, only by implication, upon the ground that they are inconsistent with the present law. If that is no law then the excise act is in force, and the indictment and proof in the present case are applicable to the 15th and 16th sections of excise law. (*See 5 Denio*, 70, 112; 3 *Barbour*, 548.)

II. If some of the numerous sections of the law, under examination, are in conflict with the constitution, the *whole law* is not thereby rendered a nullity. (*Mowrys v. Dake*, 8 Term R. 411; 5 *Denio*, 646; 16 *Wend.* 61; 14 *id.* 265.)

The question in this case is, is so much of this act valid, as declares “whoever shall hereafter sell intoxicating liquors, except for sacramental, mechanical, medicinal, or chemical purposes, shall be guilty of a misdemeanor?”

The question upon the proof in this case is still narrower,

Wynehamer v. The People.

and may be stated in this form: "Is a law prohibiting the sale of liquor to be drank on the premises, where sold as a beverage, unconstitutional?"

III. Such prohibition does not deprive any person of his property within the meaning of the constitutional provision upon that subject. (5 *Cowen*, 538; 7 *id.* 585; 4 *Wendell*, 9; 3 *Cowen*, 686; 20 *John*. 258.)

1. Such prohibition is the mere exercise of the police power of the state, the most essential and valuable element of government.

2. The end sought by it is expressed in the title, "the prevention of intemperance, pauperism and crime." In the language of Justice Woodbury: "It aims at a right object, and is calculated to promote it. It is adapted to no other, and no other sinister or improper view can therefore either with delicacy or truth be imputed to the legislature."

3. The means—prohibition of the sale of intoxicating liquors for use as a beverage—being adapted to the accomplishment of the praiseworthy object expressed in the title of the act, and in no wise in conflict with any provision of the constitution, this court will not inquire whether such prohibition is the *most prudent* or *most feasible* that might be devised by statesmen to produce the result desired. Those considerations belong exclusively to the legislature.

In the language of Chief Justice Marshall: "The judicial department can listen only to the mandates of law, and can tread only that path which is marked out by duty." (4 *Peters*, 410; 4 *Wheaton*, 316; 14 *Howard*, 39; 7 *id.* 1; *Opinion of Chief Justice Taney*.)

Fourth.—None of the provisions of the "act for the prevention of intemperance, pauperism and crime," *applicable to this case*, the retail sale of intoxicating liquors, and this proceeding, by indictment, (whatever opinion may be formed of the validity of other provisions) being in conflict with the constitution of the United States, or of this state, if the allegations of the sellers of intoxicating liquor were true, that those constitutional provisions are arbitrary and despotic, and therefore in conflict

Wynehamer v. The People.

with natural justice, this court nevertheless will affirm the judgment in this case, and the validity of such provisions of the statute, because *judges* in the exercise of judicial power can not recognize any higher law than the constitutions of this state and of the United States. (20 *Johns.* 102; *id.* 735; 21 *Wendell*, 563; 1 *Hill*, 324; 20 *Wendell*, 365; 11 *Peters*, 420; *Gredell's opinion*, 3 *Dallas*, 399.)

Parker, in reply.

It is probably sufficient for the plaintiff in error in this case, that "property" is expressly protected by the constitution. But if there were no such exception, its protection and the protection of certain personal rights would be implied.

It is a dangerous heresy to say that "the constitution is a restriction upon the powers which the legislature would otherwise possess." On the contrary it is well settled by judicial decisions, that the legislature has no powers but such as are derived from and under the constitution. The constitution is but a *grant of power*: of certain limited and defined powers, to the different departments of government. The constitution is said to be "a power of attorney," "a commission" from the people, under which the legislature acts. (*Blackwell on Tax titles*, 15, 16, 17, 21, 22; 1 *Kent Com.* 452; 4 *Hill*, 144; 1 *Dana R.* 511; 2 *Peters R.* 657; 1 *J. J. Marsh*, 566, 567, 571; 1 *Ohio State R.* 633; 5 *Dallas*, 388; 2 *Cranch*, 390, and the cases cited under my 9th point.)

As between the people and their representatives, it is absurd to say that the power of the representatives is supreme unless expressly restrained by the constitution.

"Legislative power" is granted to the legislature, "judicial power" to the courts. The one can not invade the province of the other. If the legislature adjudge a thing a nuisance, it exercises a *judicial* power, and the act is void. This would be so even if the thing were not, as it is in this case, harmless in itself and in its effects also, when properly used. Such a despotic and arbitrary exercise of judicial power would never be made in any *court*; and this case is the best illustration that

Wynhamer v. The People.

can be furnished of the necessity for a strict construction of powers conferred.

The term "legislative power," is to be construed strictly. It can not be enlarged by implication. It being a power revocable, and conferred for the benefit only of the grantors—a *mere agency*—it must be construed so as to protect the rights of the grantors, *that being the sole object of the grant*. The power must be so construed as to preserve, not to destroy. (*Taylor v. Porter*, 4 Hill, 144; *Wilkinson v. Leland*, 2 Peters, 657; *Story on Const.* § 1393, § 1399.)

It is a principle at the foundation of our government that man is endowed by his Creator with certain "*inalienable rights*." These rights can only be lost by "due process of law." They could not be taken away by the legislature, even if there were no restriction in the constitution.

What is meant by "legislative power?" It does not, certainly, cover every possible legislative act; that would render the legislature omnipotent. But these words "legislative power" are to be construed so as to exclude the powers granted to other governmental agencies and also the *inalienable rights*, I have mentioned. There can be no legislative power over an inalienable right. We can not delegate to another the power to alienate a right that is inalienable.

Under this principle it is, and under this only, that we are protected against the enactment of sumptuary laws. The legislature has not the power to regulate my hours of sleep, or my diet or dress. (2 Kent, 329.) These are personal, reserved, inalienable rights, not within the scope of the grant of "legislative power."

This case involves not only the right of the owner to *sell* his property, but also the right of another to *purchase*. The purchaser has as much right to complain as the vendor. As to the purchaser, as to every citizen who may desire to purchase, the act in question is a *sumptuary law*, and void. All citizens are prohibited purchasing the article for use as a beverage. *Absolute prohibition as a beverage* is conceded to be the object and effect of the act.

Wynehamer v. The People.

It is a sumptuary law, absolutely prohibiting the purchase for use as a drink, of what is not denied to be a wholesome and useful article, if properly used.

It is thus an invasion by the legislature of the inalienable right of the citizen to judge for himself in relation to his own diet.

It is no answer to say, it may be abused. Its abuse may be punished. but the right to use property can not be taken away.

As a violation of the right of the citizen, therefore, to *purchase*, as well as of the owner to sell, the act is unauthorized and void.

We concede the sale may be regulated as to time, manner, place, license, &c.; but it can not be absolutely prohibited, nor can the citizen be deprived of its proper use as a beverage.

It has been loosely said *obiter*, by one or two judges in other states, that the use of intoxicating drinks might be prohibited, but it has never, in any case, been so adjudged, in a case where that question was involved.

It is the duty of the courts to define the limits of "legislative power," and to declare void every legislative act transgressing such limits. It was done by Chancellor Kent, in *Gardner v. The Village of Newburgh*, (2 *John. Ch. R.* 162, 166) in 1816, before the adoption of the constitutional restriction as to protecting private property; and even in England, where the parliament is said to be supreme, Lord Coke held in *Doct. Bonham's* case, (8 *Coke*, 118,) "that the common law doth control acts of parliaments, and adjudges them void when against common right and reason," and Ch. J. Hobart said, in *Day v. Savage*, (*Hob. Rep.* 87,) that an act of parliament, made against natural equity, as to make a man a judge in his own case, was void.

In this country, where so much less power is conferred on the legislature, where all sound thinkers concur in the doctrine that "that is the best government which governs least," no one could calculate the train of evils which would flow from

Wynehamer v. The People.

a doctrine which should deprive a citizen of his right to "self-government" in matters not injurious to others.

I was asked by two members of the court, on the argument, where congress got the power to forbid the sale of spirituous liquors to the Indians, as if that were the exercise of the same power claimed for the legislature in passing the prohibitory act.

The answer is a very plain one. The Indians are subjects but not citizens. They can not even become citizens by naturalization. They are regarded as being in a state of pupilage. They are under the protection of government but have no share in it. Even in the states there is the same right to forbid the sale of liquor to them as to infants, apprentices, &c. (1 R. S. 681, § 16.) The right as to Indians is exercised in this state. (*Sess. Laws of 1849*, p. 576.)

But it is said the act of congress authorizes the destruction of liquor illegally introduced among the Indians. This is only in the "Indian country." It is not within a state, or even an organized territory of the United States. (Act of Congress, 1834, Ch. 161, § 16.) It is in a region still under the recognized government of the Indians, organized under a treaty and protected by the United States, into which region a citizen of the United States, can only enter as a licensed trader, and a foreigner only by a passport from the war department, and for a limited time. All white men, except officers of government and United States troops, are excluded from the "Indian country." An Indian trader having no right to enter, except by a license and subject to certain conditions, can not, surely, have any legal ground of complaint if liquors surreptitiously and illegally introduced by him are seized and condemned under the 20th section of the act. The property is forfeited by the very conditions of the license by which he entered the country. Besides, so far as the rights of the trader are concerned, the "Indian country" is a foreign government. He has no share in it, has no reserved rights as to person or property, either express or implied.

•

Wynehamer v. The People.

COMSTOCK, J.—The defendant was indicted and convicted by a common law jury, in the Court of Sessions of Erie county, for selling liquors in small quantities, contrary to the “act to prevent intemperance, pauperism and crime,” passed April 9th, 1855. The indictment contains no allegations to bring the law within any of the excise laws of the state, even if those can be regarded as unrepealed, and the conviction therefore must stand, if it can stand at all, upon the statute referred to. It was admitted on the trial that the defendant was the owner of the liquors in question before and at the time the law took effect; and his counsel insisted that he was entitled to an acquittal on the ground, among others, that the statute was unconstitutional and void. The proposition was overruled. The Supreme Court in the eighth district affirmed the conviction, thus determining that the act, in its prohibitory clauses, was constitutional and valid; and this is the only question I shall consider.

The constitution of this state has vested “the legislative power,” in the senate and assembly, subject, however, to some special limitations, which are of very great interest and importance. It is declared (*art. I, sec. 1,*) that “no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.” It is further declared (*art. I, § 6,*) that no person shall be deprived of life, liberty or property without due process of law. Nor shall private property be taken for public use without just compensation.” Without inquiring into the extent of legislative power in the absence of special restraints, I think the case before us can be and should be determined under these limitations, the construction, force and application of which will be hereafter considered.

And in determining the question whether the act “to prevent intemperance, pauperism and crime,” was an exercise of power prohibited to the legislature, an accurate perception of the subject to which it relates, is the first requisite. It is then, I believe, universally admitted that when this law was passed,

Wynhamer v. The People.

intoxicating liquors to be used as a beverage were *property* in the most absolute and unqualified sense of the term; and as such, as much entitled to the protection of the constitution as lands, houses, or chattels of any description. From the earliest ages they have been produced and consumed as a beverage, and have constituted an article of great importance in the commerce of the world. In this country, the right of property in them, was never, so far as I know, for an instant questioned. In this state, they were bought and sold like other property; they were seized and sold upon legal process for the payment of debts; they were, like other goods, the subject of actions at law, and when the owner died, their value constituted a fund for the benefit of his creditors, or went to his children and kindred, according to law or the will of the deceased. They entered largely into the foreign and internal commerce of the state, and when subjected to the operation of this statute many millions in value were invested in them. In short, I do not understand it to be denied that they were property, in just as high a sense as any other possession which a citizen can acquire. Judicial authority might be cited, but this does not seem necessary, where there is scarcely a controversy.

It may be said, it is true, that intoxicating drinks are a species of property which performs no beneficent part in the political, moral or social economy of the world. It may even be urged, and I will admit, demonstrated with reasonable certainty, that the abuses to which it is liable are so great, that the people of this state can dispense with its very existence, not only without injury to their aggregate interests, but with absolute benefit. The same can be said, although, perhaps, upon less palpable grounds, of other descriptions of property. Intoxicating beverages are by no means the only article of admitted property and lawful commerce in this state, against which arguments of this sort may be directed. But if such arguments can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of the legislature, and the guaranties of the constitution are a mere waste

Wynehamer v. The People.

of words. The foundation of property is not in philosophic or scientific speculations, nor even in the suggestions of benevolence or philanthropy. It is a simple and intelligible proposition, admitting in the nature of the case of no qualification, that that is property which the law of the land recognizes as such. It is, in short, an institution of law, and not a result of speculations in science, in morals or economy.

These observations appear to me quite elementary, yet they seem to be necessary in order to exclude the discussion of extraneous topics. They lead us directly to the conclusion that all property is alike in the characteristic of inviolability. If the legislature has no power to confiscate and destroy property in general, it has no such power over any particular species. There may be, and there doubtless are reasons of great urgency for regulating the trade in intoxicating drinks as well as in other articles of commerce. In establishing such regulations merely, the legislature may proceed upon such views of policy, of economy or morals, as may be addressed to its discretion. The whole field of discussion is open, when the legislature, keeping within its acknowledged powers, seeks to regulate and restrain a traffic, the general lawfulness of which is admitted; but when the simple question is propounded, whether it can confiscate and *destroy* property lawfully acquired by the citizen in intoxicating liquors, then we are to remember that all property is equally sacred in the view of the constitution, and therefore that speculations as to its chemical or scientific qualities, or the mischiefs engendered by its abuse, have very little to do with the inquiry. Property, if protected by the constitution from such legislation as that we are now considering, is protected because *it is property* innocently acquired under existing laws, and not upon any theory which even so much as opens the question of its utility. If intoxicating liquors are property, the constitution does not permit a legislative estimate to be made of its usefulness with a view to its destruction. In a word, that which belongs to the citizen in the sense of property, and as such, has to him a commercial value,

Wynehamer v. The People.

can not be pronounced worthless or pernicious, and so destroyed or deprived of its essential attributes.

Sir William Blackstone, who wrote of the laws of England nearly a century ago, said: "So great is the regard of the law for private property, that it will not authorize the least violation of it, no, not even for *the general good of the whole community*. If a new road, for instance, were to be made through the grounds of a private person, it might, perhaps, be extensively beneficial to the public, but the law permits no man or set of men to do this without the consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man or even any public tribunal to be the judge of this common good, and to decide whether it be expedient or no. *Besides the public good is in nothing more essentially interested, than in the protection of every individual's private rights as modeled by the municipal law*. In this and similar cases the legislature alone can and frequently does interfere and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnity and equivalent for the injury thereby sustained." (1 *Black. Comm.* 139.) While this language of the English commentator by no means expresses the full force of the limitation imposed upon the legislature by the people of this state in their written constitution, it contains, nevertheless, a vindication of the sanctity of private property as against theories of public good, eminently applicable to our own condition and times. In a government like ours, theories of public good or public necessity may be so plausible, or even so truthful, as to command popular majorities. But whether truthful or plausible merely, and by whatever numbers they are assented to, there are some absolute private rights beyond their reach, and among these, the constitution places the right of property.

The views thus far expressed, the substance of which I think must command a general assent, which would seem to narrow

Wynehamer v. The People.

the field of inquiry. Do the prohibitions and penalties of the act "to prevent intemperance, pauperism and crime," pass the utmost boundaries of mere regulation and police, and by their own force, assuming them to be valid and faithfully obeyed and executed, work the essential loss or destruction of the property at which they are aimed? If they do, then so far as I can see, nothing remains except to apply the provisions of the fundamental law of the state, and the act must be declared unconstitutional and void. In my judgment they do plainly work this result.

We must be allowed to know what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and consumption as a beverage, that such has been their primary and principal use in all ages and countries, and that it is this use which has imparted to them in this state more than ninety-nine hundredths of their commercial value. It must follow that any scheme of legislation, which, aiming at the destruction of this use, makes the keeping or sale of them as a beverage, in any quantity, and by any person, a criminal offence, which declares them a public nuisance, which subjects them to seizure and physical destruction, and denies a legal remedy, if they are taken by lawless force or robbery, must be deemed in every beneficial sense to deprive the owner of the enjoyment of his property. Such, I understand to be precisely the character of this law. The only sales which it permits (*vide* § 2) are for mechanical, chemical and medicinal purposes, and of wine for sacramental use. Even this exception, minute and special as it is, is attended with extraordinary conditions. The person proposing to sell is prohibited, if he pursues any one of some fifteen or twenty lawful avocations; he must be a man of totally abstinent habits, he must give stringent bail, and he must have a good moral character. Sales may also be made to the authorized venders, but as they can only sell for the particular purposes enumerated, of course sales to them can not be made in contemplation of any other purpose or use.

With these exceptions, so minute and trivial as scarcely to disturb the general scheme, the act is one of fierce and intol-

Wynehamer v. The People.

erant proscription. It is unlawful to sell intoxicating liquors, to keep them for sale, or with intent to sell, or to keep them at all (§ 1), they are declared a public nuisance (§ 25), and not only by that declaration, but by another express provision all legal protection is withdrawn from them (§ 16). If the owner attempts to sell them he can maintain no action for the price, and if they are taken from him by force or fraud he is remediless (§ 16). In other parts of the act special provisions are contained for seizure, judicial condemnation and destruction (§ 5, 6, 7, 8, 9, 10, 11, 12, 13). But the act by no means waits for the operation of this machinery. Itself pronounces the sentence of condemnation, and the judicial machinery, such as it is, which it provides, are agencies merely to ensure the execution of the sentence. Property is lost, before the police are in motion, and I may add crime is committed without an act or even an intention. On the day the law took effect, it was criminal to be in possession of intoxicating liquors, however innocently acquired the day before. It was criminal to sell them, and under the law, therefore, no alternative was left to the owner but their immediate destruction (vide § 4).

It will be seen, therefore, that aside from the exceptional cases which have been stated, and as a beverage without exception, intoxicating liquors are laid under the ban of absolute and unqualified condemnation. As property they are stripped of the fundamental attribute of sale, and their commercial value thus annihilated. They are moreover devoted to physical destruction. Special agencies for destruction are provided, but before these are set in motion, the law itself condemns them as property in a series of provisions entirely free from ambiguity or doubt. It was said on the argument that notwithstanding the sweeping prohibitions of sale, the owner might still keep them, and even export them, and so effect a total or partial saving of his property. If this were so, I do not see how it would affect the question under consideration. If laws contrived for the destruction of property within the state are unconstitutional and void, they can not be upheld, even though

Wynehamer v. The People.

special leave be given to the owner to remove it from the state, and so place it beyond the reach of those laws. But the suggestion is founded in a misapprehension of the act. From the instant it took effect, intoxicating liquors could not lawfully be kept a single hour with a view to exportation, or kept at all, except for the special purposes of medicine, the sacrament, or for mechanical or chemical uses. It might be smuggled away, but that would not be the fault of the law. It would be quite as logical to say that an act to deprive a man of his liberty or life, without a trial, is constitutional, because there is a possibility that he may run away and thus escape.

There are many provisions of this act which were reviewed at length on the argument, and which might now receive a more particular notice. But the summary exposition which has been given, is enough for our present purpose. Proceeding upon the admitted hypothesis that the subject thus denounced and proscribed, is property, and like other property essentially inviolable, the inquiry will remain whether the constitution does not expressly prohibit such legislation?

It has been urged upon us that the power of the legislature is restricted, not only by the express provisions of the written constitution, but by limitations implied from the nature and form of our government; that aside from all special restrictions, the right to enact such laws is not among the delegated powers of the legislature, and that the act in question is void, as against the fundamental principles of liberty, and against common reason and natural rights. High authority, certainly, has been cited to show, that laws which, although not specially prohibited by written constitutions, are repugnant to reason, and subvert clearly vested rights, are invalid, and must so be declared by the judiciary.

In *Calder and wife v. Bull* (3 *Dallas*, 386) Judge Chase said: "I can not subscribe to the omnipotence of a state legislature or that it is absolute and without control, although its authority should not be restrained by the constitution or fundamental law of the state. The nature and ends of legislative power will limit the exercise of it. This fundamental princi-

Wynehamer v. The People.

ple flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, *nor refrain from acts which the laws permit*. There are acts which the federal or state legislature can not do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof government was established. * * * A few instances will suffice to explain what I mean. A law that punishes a citizen for an innocent action, or in other words, for an act which when done was in violation of no existing law, *a law which destroys or impairs the lawful private contracts of citizens*, a law that makes a man a judge in his own case, *a law that takes property from A and gives it to B*. It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it can not be presumed that they have done it. *The legislature can not change innocence into guilt or punish innocence as a crime, or violate the right of antecedent lawful private contract, or the right of private property.*"

Chief Justice Marshall said, in *Fletcher v. Peck*, (6 Cranch, 135): "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found, *if the property of an individual fairly and honestly acquired may be seized without compensation?*" See also, *Dash v. Van Vleck*, (7 John. 477;) *Taylor v. Porter*, (4 Hill, 146, per Bronson, J.;) *Goshen v. Stonington*, (4 Conn., 225; *Hosmer, J.*)

I entertain no doubt that, aside from the special limitations of the constitution, the legislature can not exercise powers which are in their nature essentially judicial or executive. These, are, by the constitution, distributed to other departments of the government. It is only the "legislative power" which is vested in the senate and assembly. But where the constitution

Wynehamer v. The People.

is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice Marshall said, (*Fletcher v. Peck, supra*) "How far the power of giving the law may involve every other power in cases where the constitution is silent, never has been and perhaps never can be definitely stated." That very eminent judge felt the difficulty, but the danger was less apparent then than it is now, when theories alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied as I am, that no rule can be laid down in terms which may not contain the germ of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government.

Nor is it necessary to push our inquiries in the direction indicated. There is no process of reasoning by which it can be demonstrated that the act "to prevent intemperance, pauperism and crime" is void upon principles and theories outside of the constitution, which will not also, and by an easier induction, bring it in direct conflict with the constitution itself.

I am brought, therefore, to a more particular consideration of the limitations of power contained in the fundamental law, "No member of this state shall be disfranchised or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. No person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." These provisions have been incorporated, in substance, into all our state constitutions. They are simple and comprehensive in themselves and I do not perceive that they derive any additional force or meaning by tracing their origin to *magna charta* and the later

Wynehamer v. The People.

fundamental statutes of Great Britain. In *magna charta* they were wrested from the king as restraints upon the power of the crown. With us they are imposed by the people as restraints upon the power of the legislature.

No doubt, it seems to me, can be admitted of the meaning of these provisions. To say as has been suggested, that the law of the land, or, "due process of law" may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The constitution would then mean that no person shall be deprived of his property or rights unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away, but where they are held contrary to the existing law or are forfeited by its violation, then they may be taken from him, not by an act of the legislature, but in the due administration of the law itself before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or at least it can not be *created* by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the legislature can not say they shall exist no longer, nor will it make any difference although a process and a tribunal are appointed to execute the sentence. If this is "the law of the land" and "due process of law" within the meaning of the constitution, then the legislature is omnipotent. It may under the same interpretation pass a law to take away liberty or life without a preexisting cause, appointing judicial and executive agencies to execute its will. Property is placed by the constitution in the same category with liberty and life.

Clear as this matter stands upon principle, it is equally well settled by authority. Chief Justice Gibson, of Pennsylvania, speaking of a similar clause in the constitution of that state, and of the right of property as protected by it, said: "What law? Undoubtedly a pre-existing rule of conduct, not an ex-

Wynehamer v. The People.

post facto rescript or decree made for the occasion. The design of the convention was to exclude arbitrary power from every branch of the government, and there would be no exclusion of it if such rescripts or decrees were to take effect in the *form of a statute*. The right of property has no foundation or security but the law; and when the legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen is no more." (*Norman v. Heist*, 5 *Watts & Serg.*, 193). And Chief Justice Bronson, of this state, in *Taylor v. Porter*, (4 *Denio*, 145) said: "The words 'law of the land,' as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense." And again: "The meaning of the section then seems to be that no member of the state shall be disfranchised of any of his rights and privileges unless the matter be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially, that he has forfeited his privileges, or that some one else has a superior title to the property he possesses before either of them can be taken from him. It can not be done by mere legislation." Again he adds, speaking of the words "due process of law," "if the legislature can take the property of A and give it to B, they can take A himself, and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation."

Chief Justice Ruffin, of North Carolina, in a very able and elaborate judgment, involving the construction and force of a similar clause in the constitution of that state, laid down the doctrine that the terms "law of the land," do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. "In reference," he adds, "to the infliction of punishment and divesting of the rights of property, it has been repeatedly held in this state, and, it is believed in every state in the union, that there are limitations upon the legislative power notwithstanding

Wynehamer v. The People.

ing those words, and that the clause itself means that such legislative acts as profess in themselves directly to punish persons or to deprive the citizen of his property without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested according to the course, mode and usages of the common law, as derived from our forefathers, are not effectually 'laws of the land,' for those purposes. (*Hoke v. Henderson*, 4 Dev. 18.) Chancellor Kent, (2 *Comm.* 13;) says: "the words, 'law of the land,' as used originally used in *magna charta*, in reference to this subject, are understood to mean due process of law, that is by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of *due process* of law, is that it means law in its *regular course of administration through courts of justice*." See also 3 *Story on the Const.* 661; 10 *Yerger*; 2 *Coke Inst.* 45-50.

It is plain, therefore, both upon principle and authority, that these constitutional safeguards in all cases require a judicial investigation, not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question whether under the preexisting rule of conduct the right in controversy has been lawfully acquired and is lawfully possessed. A proposition so obvious would have deserved less consideration if a singular misapprehension in regard to it did not appear to have prevailed in a decision not now before us for review, but upon the act under examination, pronounced in another branch of the Supreme Court. (*People v. Quant, in the 4th district.*)

We are brought then directly to the question, does the act "to prevent intemperance, pauperism and crime," in a just constitutional sense, deprive the citizens of this state of their property in intoxicating liquors? We have already seen that this species of property is just as inviolable as any other. That by the operation of this law, the commercial value is annihilated, that it can not be sold, that it is unlawful to keep it, that all legal protection is withdrawn from it, and that it

Wynshamer v. The People.

becomes a public nuisance. Is the owner "deprived" of it within the fair meaning of the constitution? I bring the act to this particular test, because if it can stand with this clause of the constitution, it can with every other.

Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature, property did not exist at all. "Every man might then take to his use what he pleased, and retain it if he had sufficient power; but where men entered into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof, proper laws were ordained." (*Tomlyn's Law Dic., Property*; 2 *Bl. Comm.* 3, 4.) Material objects, therefore, are property, in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are fundamentally the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so whatever removes the impression, destroys the notion of property, although the things themselves may remain physically untouched.

Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says, (1 *Comm.* 138,) "The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land." Chancellor Kent says, (2 *Comm.* 110,) "The exclusive right of using and *transferring* property, follows as a natural consequence from the perception and admission of the right itself." And again, (p. 320) "The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants." By another author property is defined as an "exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging

Wynehamer v. The People.

them for other things, or giving them away to any other person without consideration, or even throwing them away.” (*Bouvier Law Dic. tit. Property.*) These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made.

The statute under consideration, without reference to its provisions for the seizure and physical destruction of intoxicating liquors, by force of its prohibitions alone, sweeps them from the commerce of the state, and thus annihilates the quality of sale which makes them valuable to the owner. This is destructive of the notion of property. I need, perhaps, take no further notice of their qualified vendibility for the sacrament and the other special uses named in the act. These are only the occasional and incidental uses of the article. It is the general and primary use which is aimed at. It is the mass of property which is struck down, and the possible conservation of an extremely insignificant portion, can not change the character of the law.

No ingenuous advocate of the law will deny that its great characteristic is prohibition, intended to turn back from the channels of commerce important masses of property, and thus, by suppressing the use to prevent the abuse. To regard the act in any other light would be a fraud upon its entire policy, and upon the views and motives in which it must be supposed to have had its origin. And in order to a full view of the spirit and intent of the law, to simple prohibition, we must add its penalties and its other connected and dependent clauses, the whole forming one scheme, and all tending with fatal accuracy to the destruction of property in intoxicating liquors within this state.

Unless, therefore, the right of property in liquors is denied altogether, and this has never been done, or unless they can be distinguished from every other species of property, and this has not been attempted, the act can not stand consistently with the constitution. The provisions of the constitution should receive

Wynehamer v. The People.

a beneficent and liberal interpretation where the fundamental rights of the citizen are concerned. But in the case before us, its plain and obvious meaning is enough. "No person can be deprived of his property without due process of law" by the legislature or any other power of the government. When a law annihilates the value of property and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power.

I have not reached this result without an attentive examination of the arguments which have been urged in favor of an opposite conclusion. Such of them as may appear to have most weight, or to have been most relied on, may here be noticed.

Prominent among these suggestions our attention has been directed to a supposed analogy between the act under consideration and the license and excise laws of this and other states, the constitutionality of which is not questioned. I think the analogy does not exist. However difficult it may be to define, with accuracy and precision, the line of separation, there is a broad and perfectly intelligible distinction between what is plainly regulation on the one side, and plainly prohibition on the other. In another case great difficulty may attend the inquiry, but no greater certainly than often attends judicial investigations. The inquiry is essentially judicial in its nature, and whenever a case of difficulty arises it must be met and determined upon its special circumstances and by the aid of such light as can be obtained. In the present case the difficulty suggested is not perceived. The statute we are examining passes the utmost limit of regulation, and does not even wear a disguise. It is plainly prohibitory in every feature and in its entire scope and policy. Some of the excise acts referred to were of great stringency, considered as regulations merely of traffic in intoxicating liquors, but none of them totally prohibited their sale as a beverage, or denied to them as such the

Wynehamer v. The People.

essential qualities of property, or placed them without the protection of the laws.

It is certain that the legislature can not totally annihilate commerce in any species of property and so condemn the property itself to extinction. It is equally certain that the legislature can regulate trade in property of all kinds. Neither of these propositions is denied; but they necessarily lead to another, that between regulation and destruction there is somewhere, however difficult to define with precision, a line of separation. All reasoning, therefore, in favor of upholding legislation which belongs to one class, because it is often difficult to distinguish it from that which belongs to the other, must be fallacious, because it is simply reasoning against admitted conclusions.

The provision in the federal constitution declaring that no state shall pass laws impairing the obligation of contracts, and the course of judicial decision under that provision, may be referred to as illustrating the distinction between legislation which is remedial merely, and that which is subversive of the rights intended to be saved. Under this provision the constitutionality of state laws has often been examined, and the difficulty of distinguishing between statutes which regulated the remedy and those which impaired or subverted the right has been great and acknowledged. But the distinction itself has been steadily maintained. Neither the federal nor the state courts have ever shrunk from the inquiry; and laws which transcended the limits of regulation merely, and directly or indirectly invaded the right, have been uniformly adjudged to be void.

Nor could we escape the kindred inquiry in the case before us, although it were attended with much greater difficulty than we believe it to be. Does the statute under consideration simply regulate or does it destroy an admitted species of property in which millions of value are invested? As this question is answered the act must stand or fall, and in our judgment but one answer can be given.

Besides the license and excise laws, our attention has been

Wynehamer. v. The People.

drawn to other legislative enactments, producing in their result great injury to private property, the constitutionality of which has been admitted or adjudged. The embargo act of congress in 1807, (2 *Statutes at Large*, 451,) is mentioned as one of these examples of legislation. I do not perceive any analogy which can influence the present question. That was an act which simply prevented "all ships and vessels in ports and places within the limits or jurisdiction of the United States," from sailing upon any enterprise of *foreign* commerce. It is not important to inquire under what particular clause of the federal constitution the power was derived to enact such a law. That it went to the utmost verge of constitutional power has been universally conceded. (3 *Story on the Constitution*, 163.) It is enough for the present purpose to say that it was recommended and adopted as a measure of *protection* to property and not of annihilation. In the language of Justice Story, (*id.* 161,) "it was avowedly recommended as a measure of safety for our vessels, our seamen and our merchandise from the threatening dangers from the belligerent powers of Europe." In other words, it was an act of conservation, and not of destruction; although, in its effect, it bore with great severity upon the interests of the commercial states, and upon the property of individuals. It did not aim at the extinction of any species of property, or of any of its attributes. If congress, proceeding upon a theory that all foreign commerce was injurious to the interests of the nation and the morals and habits of the people, had passed an act intended to destroy it perpetually, and for that purpose, confiscating ships and vessels, prohibiting their sale, making it unlawful to keep them with intent to sell, or keep them at all, and declaring them a nuisance, and such a law had been adjudged valid, then, and I think not till then, an analogy might be traced having something to do with the question before us.

Statutes conferring upon municipal corporations powers, which, in their execution and ultimate result, inflict incidental or consequential injury upon the property of individuals, injury for which it is said the law affords no remedy, have been

Wynehamer v. The People.

adjudged constitutional. In legislation of this kind, it is also supposed some warrant can be found for the act under consideration. Here, again, the analogy fails. Laws of this character proscribe no species of property. They may injure it in their remote and accidental result, but they do not, like this act, say it shall not be allowed to exist at all, or strike directly at the qualities and attributes, without which it can have no legal existence. The constitutional requirement is, that no person shall be *deprived of his property*, and that private property shall not be taken for public use without just compensation. It is nowhere declared, that in the exercise of the admitted functions of government, private property may not receive remote and consequent injury without compensation. (See *Radcliff's Executors v. The Mayor of Brooklyn*, 4 *Const.* 175.)

The authorized destruction of buildings in the city of New York by direction of the mayor and aldermen, in order to prevent the spread of a conflagration, (see 2 *R. L.* of 1813, p. 368, § 81,) has been referred to as a constitutional exercise of legislative power which deprives a citizen of his property. It is enough to say of such statutes that they are founded upon and are mere regulations of the common law right of any person to destroy property in a case of immediate and overwhelming necessity to prevent the ravages of fire or pestilence, (2 *Kent. Comm.* 339; *Russell v. The Mayor, &c., of New York*, 2 *Denio*, 461; 17 *Wend.* 285; 25 *id.* 157.) Statutes of this description merely appoint a municipal agent to judge of the emergency, and direct the performance of acts which any individual might do at his peril without any statutes at all. If such legislation can prove any thing to the present purpose, it would show that these powers of destruction may be invoked in order to reform the morals and habits of society, and therefore that authorized agents of the legislature, or individuals without authority, may go forth on a roving commission to seize and destroy all intoxicating liquors within the borders of the state, and plead an overruling necessity as a justification of their lawless acts. This would be a mission which phi-

Wynnehamer v. The People.

lanthropists and reformers have not yet undertaken, and certainly which no judge or lawyer would defend.

Other examples of legislation have been cited which may be grouped together and considered at a single view: laws of quarantine, which detain ships for a limited period, coming from places where pestilential diseases exist; laws against smuggling, which forfeit the goods and the vessels in which they are conveyed for nonpayment of impost duties; laws against gambling, which forfeit the tools and implements with which the offence is committed; laws against horse racing, under which it is said the horses unlawfully used are forfeited; laws against selling liquors to Indians, under which the liquors themselves may be forfeited. Examples of this sort are supposed to have a peculiar application to the question, because by the force of statutes of admitted validity, property is specifically forfeited, and so the owner deprived of it. There is, however, a fallacy in all reasoning and illustration from such sources, which can be readily exposed.

And the precise and fatal difficulty in the argument is that the only resemblance between the statutes referred to, and the one under consideration is in the *character of the punishment*. The prohibitions themselves are totally unlike, and relate mostly to different subjects. That the punishment for violating such prohibitions is similar, or even the same, amounts to nothing, when the question is whether the prohibitions themselves, or any one of them, is constitutional or valid. Take for example, the instance of smuggling. No one doubts the power of congress to prohibit the importation of goods without the payment of duties, nor consequently that the offender may be punished by a forfeiture of the goods, by pecuniary fine or imprisonment. But whether the legislature of this state has power to prohibit the keeping or sale of property in general, or any particular species, is the precise question now to be determined. — When that is first established, then the owner who violates the prohibition may lose his property, or be fined, imprisoned, banished or put to death. It is certainly a simple

Wynnehamer v. The People.

proposition than an admitted public offence against a constitutional statute may be punished by loss of property, of money, of liberty or of life; but how this tends to show that another statute prohibiting things of a totally different character, and similar only in its sanction or penalty, is valid, and the offence itself constitutionally created, is what I have been unable to perceive. In a word, to trace an analogy between two statutes in the manner of enforcing them or punishing the offender, does not advance a step toward proving that either the one or the other is constitutional or the contrary.

The illustration from the statutes referred to, and all others which can be referred to, fails for another reason of great significance, which seems to have been overlooked by those who assert the validity of the prohibitory law. It is an entire misconception of the law itself to say that the species of property to which it relates is *forfeited for a violation* of its provisions. It is simply *extinguished* by the force of the prohibitions themselves. In other parts of the act pecuniary penalties and imprisonment are inflicted, but the loss of property is not exacted as a forfeiture at all in any just or ordinary sense of the term. It is quite absurd to say of a law which enacts in substance, that property of a particular species shall no longer exist, that it imposes a forfeiture of such property as the punishment for violating the prohibition. There is no offence except the misfortune of being the owner. A forfeiture of goods implies a title to them, good against all the world, but if this law is valid, then the owner has no title to lose. Analogies for such legislation will be sought for in vain.

In respect to one of the statutes which have been mentioned, that which prohibits the sale of intoxicating liquors to Indians, it should be further observed, that Indians are considered as persons *inops consilii* under the tutelage of government and in the same catagory with minors, habitual drunkards, &c. These classes of persons are especially the subjects of governmental care, and to concede that the legislature may restrain or prohibit the sale of spirituous liquors to them, is only admitting that it may regulate traffic in any species of property; an ad-

Wynehamer v. The People.

mission which suggests the distinction already sufficiently considered between the power to regulate and the power to destroy.

It has been said also, that the admitted power of taxation may be so exercised under legislative authority as greatly to impair the value of private property. This is undoubtedly true, but it throws no light upon the present question. The power may be wisely or unwisely, justly or unjustly exercised, but as a power it rests upon the theory, that full compensation is received by the individual in the benefit conferred by the tax itself. The support of government, and other objects of public utility promoted by taxation, are supposed to return to the individual the value which has been taken from him as his share of the public burthen. This is neither depriving a man of his property in the constitutional sense, nor taking it for public use under the right of eminent domain.

Again, it may be suggested, if in a given case it could be plainly seen that the confiscation and extinction of a species of property were the essential object of a statute, it should be declared unconstitutional although disguised under the forms of taxation.

It has also been supposed that some authority for legislation of this kind is found in the observation of one or two of the judges of the Supreme Court of the United States, delivered when the license laws of Massachusetts, Rhode Island and New Hampshire were examined in that court (5 Howard, 504). This is quite a mistake. The question involved and determined was that the excise laws of those states did not conflict with the authority of congress to regulate commerce with foreign countries, and among the states. Whatever was said beyond that was of course *obiter dicta* merely, and even as such had no reference to the limitations of legislative power contained in state constitutions.

It is scarcely necessary perhaps to observe, that in the views which have been expressed, it is not intended to narrow the field of legislative discretion, in regulating and controlling the traffic in intoxicating liquors. We only say that in all such

Wynehamer v. The People.

legislation, the essential right of the citizen to his property must be preserved, a right which includes the power of disposition and sale, to be exercised under such restraints as a just regard, both to the public good and private rights may suggest.

I am not insensible to the delicacy and importance of the duty we assume in overruling an act of the legislature, believed by so many intelligent and good men to afford the best remedy for great and admitted evils in society. But we can not forget that the highest function entrusted to us is that of maintaining inflexibly the fundamental law; and believing, as I do, that the prohibitory act transcends the constitutional limits of the legislative power, it must be adjudged to be void. The judgments of the Supreme Court and of the Court of Sessions must therefore be reversed.

Judges *Denio, A. S. Johnson, Selden and Hubbard* concurred.

Judges *T. A. Johnson, Wright and Mitchell* dissented,

Judges *T. A. Johnson* and *Wright* delivered the following opinions:

T. A. JOHNSON, J.—The plaintiff in error was indicted by a grand jury of Erie county, charged with having sold intoxicating liquor in small quantities, contrary to the provisions of the prohibitory act of April 9th, 1855, and was tried and convicted of the offence, at a Court of Sessions. It was proved upon the trial, that he had on several occasions, between the 4th of July of that year, and the time of the indictment, sold and delivered at his bar, in Buffalo, to various persons, brandy in quantities less than one pint, which was drank upon his premises. As the plaintiff in error had no license to sell, in that manner, and for that purpose, the acts proved, were such as have been misdemeanors in this state, by statute, subjecting the offender to indictment and conviction, in the manner adopted in this case, certainly ever since the excise act of

Wynehamer v. The People.

1801, up to the time when the act in question took effect. It is to be seen, therefore, whether such acts are still criminal in their character, or whether, under the present statute, the criminal feature, so long and uniformly stamped upon them, hitherto, has been taken away.

The indictment is for selling contrary to the provisions of this act, and not to the provisions of the Revised Statutes, and unless this act has been violated, the conviction in any view is erroneous.

Only two questions properly arise in this case: First, Was the liquor so sold by the plaintiff in error, subject to the prohibition in the first section of the act? And second, Has the legislature power to enact a valid law, to prohibit the traffic in intoxicating liquors, to the extent to which prohibition is sought to be carried by the act in question?

The ground upon which it is claimed that the liquor in question, and consequently the act of selling, was exempt from the operation of the act, is, that it was liquor which was imported from a foreign country, in pursuance of the laws and treaties of the United States, and the duty regularly paid upon it by the importer. That the plaintiff in error purchased it from the importer, in the original package, and drew it from such package when it was sold as complained of. These facts, which the plaintiff in error offered to prove on the trial, were admitted on the part of the public prosecutor; but the evidence was objected to on the ground that it was irrelevant and immaterial; and the evidence and the consideration of the facts conceded, were excluded by the court on that ground. Under these circumstances was this liquor subject to the prohibition in the act, at the time of the sales in question, or was it exempt? The last clause of the first section is as follows: "This section shall not apply to liquor, the right to sell which, in this state, is given by any law or treaty of the United States."

Doubtless the first section did not apply to that liquor while in the hands of the importer and before he had sold it, assuming the facts, as they were admitted to exist. But did the exemption which thus far attached, follow it into the hands of

Wynehamer v. The People.

the plaintiff in error, so as to authorize sales by him. Is that the meaning of the provision? This must depend, I think, upon the question whether the laws or treaties of the United States follow property imported from foreign countries, after it has passed from the hands of the importer to citizens of this state and confer any rights or privileges upon it, which do not attach to other property in this state, not imported.

If they do not, the terms of the exception do not apply the right to sell, at the time and in the manner, was not given by any law or treaty of the United States. That these laws and treaties do not thus follow property after it has passed from the hands of the importer, and become part of the mass of property in the state, is conclusively established. (*Brown v. The State of Maryland*, 12 Wheat. 419; *License Cases*, 4 How. 504.)

The obvious design of the provision was not to confer any privilege or give any exclusive right to foreign over domestic liquor, but simply to avoid all collision between state and federal authority. The exemption continues while the right continues. But, where the article has passed from under federal jurisdiction, and no right from that source is any longer given, the exemption ceases. The right must be given at the time of the sale, or the liquor sold, is not exempt.

This is, I think, the plain reading of the clause, and that such was the intention of the legislature, no one can reasonably doubt. If we could ignore the whole scope and spirit of the act, and exclude from view its design as declared upon its face, and look only to the wording of the clause, we might give the construction to it contended for by the learned counsel for the plaintiff in error. But this would violate all rules for the interpretation of statutes. If the language is susceptible of interpretation in harmony with the declared object of an enactment, courts are bound to give it that interpretation.

They can only give a construction which will convict the legislator of absurdity or folly, in cases where the language employed is so clear as to leave no alternative.

Without stopping, therefore, to inquire whether there is any existing law or treaty, which had at some time, and under other

Wynehamer v. The People.

circumstances given another person the right to sell the liquor in question, it is clear that neither could have conferred any right upon the plaintiff to make the sales of which he was convicted, and the exception does not help him.

The question then arises, whether the legislature has power to make a valid law prohibiting the sale of property of this description, for the purposes for which it had been before most commonly purchased. It is a question of power simply, and leads to an inquiry, first, into the nature and extent of the law-making power in a state government within the United States.

Each state is, undoubtedly, a complete and perfect sovereignty in itself, in all cases and in respect to all matters in which powers naturally pertaining to states as sovereignties, have not, by express grant or by necessary implication, been conferred upon the general government.

In respect to the powers conferred upon the general government by the constitution of the United States, the states are subordinate powers, and can enact no valid laws in conflict with that constitution, or with laws constitutionally enacted by congress, or treaties made under the proper authority.

The position is assumed by the learned counsel for the plaintiff in error, that any law of a state limiting and restricting or prohibiting sales of imported property, by the immediate or remote purchaser from the importer, inasmuch as it might, and naturally would, tend to discourage and prevent importation, is in derogation of the authority of the general government, under which importations are authorized, and therefore void. But the conflict of authority between the two jurisdictions has never been carried to this extent, and the law in this respect is decisively settled the other way in the case above cited. Chief Justice Taney, in his opinion in the license cases, says:

“ These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce and become part of the general mass of property in the state. These laws may indeed discourage imports and diminish the price

Wynehamer v. The People.

which ardent spirits would otherwise bring. But although a state is bound to receive and to permit the sale, by the importer, of any article of merchandise which congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importations or diminish the profits of the importer, or lessen the revenue of the general government.

“And if any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.”

The doctrine contended for, if well founded, would deprive the state of all power to regulate the use or transfer of such property or to tax it, and tend to the subversion of all state government.

It is claimed also, that the act in question impairs the obligation of contracts, and is, therefore, in conflict with the constitution of the United States.

It is difficult to see, however, how this act impairs the obligation of any contract which was in force when the act took effect, or what possible bearing it can have upon such contracts.

The case must undoubtedly rest upon the question of legislative power, under the state constitution, irrespective of all questions of federal authority. The power to make general laws is necessarily and inherently sovereign power. The first idea of a law, obliging to acts, or forbearance of acts, involves the idea of sovereignty as to its origin. With us this power is lodged by the constitution, with the senate and assembly, and it exists in those bodies as fully as it did or could exist in the sovereign people, by whom the constitution was made, except in those cases where its exercise is limited and restricted by some express or clearly implied limitation in the instrument itself.

Where the power is limited, it can only be exercised subject to, and in accordance with, the limitation. In those cases it is a limited sovereignty.

But where the constitution imposes no restriction, and the power sought to be exercised is not possessed by the general government, it exists without restriction. The only limitation, then, for aught I can see, is the discretion of those who possess and are appointed to use it, within the boundaries of human action or capacity. And whether the constitution is to be regarded as a grant of the power, or the mere recognition and acknowledgment of its existence as inherent in those bodies, the result is the same. For if a grant it is plenary, and carries the entire legislative power, the power to make laws for the government of the state, to be enforced upon those who granted it. However derived it is a superior power, sovereign in its nature, and the rules, which apply to mere delegated and secondary powers, do not apply to it.

Clothed with this power, the corresponding duty necessarily devolves upon the legislature of determining what acts are compatible with the safety and welfare of all classes of citizens, and what not; and what acts are so far prejudicial and injurious as to become criminal; such acts it may declare criminal, and forbid, and fix the grade of the crime and the appropriate measure of punishment. Some criminal acts it punishes with the forfeiture of life, some with that of liberty and all civil and political rights, others with the forfeiture of property, and the infliction of penalties only.

It authorizes the real and personal property of one person, without his consent and against his will, to be alienated and transferred to another in satisfaction of obligations unperformed and promises broken. It levies contributions in the form of taxes upon every man's property for the support of government, and to make improvements conducive to the general convenience and prosperity.

All this is but the common, ordinary exercise of legislative power. One of its first and clearest duties is to make all necessary laws, to remedy existing and admitted evils, and to

Wynehamer v. The People.

prevent their recurrence. And of this character, and for this object, is the statute in question.

That intemperance, pauperism and crime are evils, with which the government is necessarily compelled to deal, none will deny.

In the judgment of the legislative bodies by which the statute was enacted, one great source of all great, oppressive and dangerous evils was the traffic in intoxicating liquors. So injurious in their opinion has this traffic become, under existing restrictions, in its consequences upon the community, that it ought to be subjected to still more rigorous and extensive restrictions and prohibitions, and impressed with additional features of criminality.

If the legislature had the power to enact a law to accomplish this end, the right to choose the means best calculated to effect it was necessarily vested in it, unless indeed the use of such means is forbidden by the constitution.

And this is the point apparently most relied upon by the learned counsel for the plaintiff in error. The position is that no traffic in any article which the law regards as property, however injurious it may be, can be subjected by law to such regulations and restrictions as in a great measure to destroy it without coming in conflict with that provision of section 6, art. 1 of the constitution, which declares that "no person shall be deprived of life, liberty or property without due process of law." The argument is that the value of property as an article of trade is an essential element of it as property, and that to the extent to which the restriction or prohibition diminishes its value for such purposes, to the same extent the owner is deprived of his property, although neither the title nor the possession of such owner is in any respect interfered with. And that this is accomplished by the operation of the act, independent of any trial or judgment; in other words, without due process of law.

Is not this a strained and unwarrantable construction and application of this provision of the constitution? Clearly it is. This provision has no application whatever to a case where

Wynehamer v. The People.

the market value of property is incidentally diminished by the operation of a statute passed for an entirely different object, and a purpose in itself legitimate; and which in no respect affects the title, possession, personal use, or enjoyment of the owner.

Such a construction would prohibit all regulations by the legislature, and all restrictions upon the internal trade and commerce of the state. It would place the right of traffic above every other right, and render it independent of the power of the government. "Deprived" is there used in its ordinary and popular sense, and relates simply to divesting of, forfeiting, alienating, taking away property. It applies to property in the same sense that it does to life and liberty, and no other. Prohibiting the sale of property, except under and in pursuance of a license, and for certain specified purposes, is in no sense depriving a person of it. The prohibition tends to hinder and prevent divestiture, but in no respect to enforce it.

The act does indeed, by other provisions, directly provide for depriving the owner of his property by forfeiture and destruction; but that is where it is kept for an unlawful purpose, and after a trial and judgment. That provision has no bearing upon the question under consideration. When the property is taken from the owner and destroyed, he is then deprived of it by virtue of the act, not before. It might be urged with precisely the same pertinency and force, that a statute which prohibits certain vicious actions, and declares them criminal, deprives persons of their liberty, and is therefore in derogation of the constitution.

The constitutional provision referred to, was intended to protect property from confiscation by legislative enactments, and from seizure, forfeiture, and destruction, without a trial and conviction by the ordinary modes of judicial proceeding. There is no pretence that the plaintiff in error in this case was not convicted by due course and process of law.

There can be no doubt, that intoxicating liquor is property. It is a chattel, an article of use, of consumption and of commerce, and is property in the strictest legal, and constitutional

Wynehamer v. The People.

sense. But in order to show that the act, by its own inherent force, and independent of the authority it confers upon the magistrates, or the courts, deprives the owner of his property, it is necessary to insist, and we are asked to determine, that the legal property is not the article itself, but consists in some of its qualities or incidents. It is urged that the legal property is principally in its vendible quality, and consists mainly in its commercial value, in the money the owners might receive in exchange for it in the market. And that in this sense, the owner is deprived of it whenever legislation tends to lessen its current market value.

The inquiry whether the chattel in its corporeal substance, and entity, is property, or whether the legal property does not consist in some incident or right which the law confers or attaches, is one more appropriate to the schools, than the courts. Constitutions and general laws are not founded in any such subtleties, and can never be safely interpreted by them.

If we permit ourselves to depart from the obvious, general fact, that the thing is property, and enter this field of speculation, into which we are thus invited, we shall be in great danger of losing our way in its uncertain paths, and involving ourselves in the grave absurdity of holding that a statute which forbids a person selling an article of use and consumption, and renders it necessary for him to keep it for his own use, and consumption, instead of selling it to others, to be used or consumed by them, really takes it away from him, and deprives him of it, contrary to the constitution.

It will be found impossible for this court, extensive and final as its authority is, to make a proposition true in law, which is so essentially, and palpably, untrue in fact.

But should we adopt the fallacy, that the exchangeable value of the chattel is the legal property; and that this is what the constitution was designed to protect, how would that affect the statute in this case? There is nothing in the terms of the act on the subject of value, or price, and the fact, if it be one, that its operation has been to reduce the price or market value of liquors, is the subject of evidence and must be established

Wynehamer v. The People.

by proof. There is not a word of proof upon the subject, in the case, one way or the other. It is not a fact of which we can take judicial notice, for the courts without evidence, can not see whether the tendency of the act has been, or will be, to enhance or to diminish the value of the stocks on hand when the act took effect. Certainly it is no truism, either in law or in political economy, that a restriction upon the sale of an article, diminishes its exchangeable value under all circumstances. If it may be still sold for some purposes, the result may well be to enhance the value. That would depend in a great degree upon the future supply. But for this court to assume the fact that the act has had, or that it will have, the effect to reduce or destroy the market prices or value of the article as the basis of its action, without any evidence whatever to support it, and proceed to declare the statute void on that ground, would be a proceeding without precedent or parallel in judicial history. It would be a mere arbitrary, judicial repeal of the statute, instead of a judgment founded on ascertained facts and the law of the land.

Even were we to go to the extraordinary and unprecedented length of holding that the government is bound to provide a market, or at least leave some market open for every noxious or deleterious article which may enter into commerce, and in which the owner has property by law, this duty has been performed in respect to liquors by the act in question. Every citizen is expressly authorized to apply for and obtain a license to sell his own liquors, for the uses and purposes permitted by the act, by complying with the conditions. And these conditions are scarcely more stringent than those imposed by the former excise laws; and besides this the right to export remains untouched.

It can not, therefore, as it seems to me, with entire candor and fairness, be contended that any single element of property has been destroyed by the act alone.

But in my judgment, the constitution has no such meaning, and is, neither in its language or spirit, susceptible of any such interpretation. It looked only to the title and possession of

Wynehamer v. The People.

the substance, and was never intended to place a restraint upon legislative power so entirely fatal to its usefulness and authority, as the construction contended for would establish.

Courts ought not certainly to extend the provisions of the constitution, by a strained construction, for the purpose of shielding and fostering a traffic, which, in the judgment of the legislature, is productive of such serious evils. The same argument would, if sound, prove all our former excise laws unconstitutional. Those laws, it is true, were confined to the retail traffic, in quantities less than five gallons. But that was the traffic from which the great majority of the consumers of the article always were, and always will be, supplied while it exists.

Every restriction upon that branch of the traffic was calculated, therefore, to affect the interests of by far the greatest number of individuals. And yet so far has the principle of restriction and prohibition, in this department of the trade, been uniformly carried heretofore, that probably not one in five hundred of the entire population of the state, has ever had the right to sell a glass of spirituous liquor, or any other quantity below five gallons, to any person or for any purpose whatever.

The exercise, of what is now claimed, as an absolute, inalienable right, to sell whatever is property, by any one, not specially authorized, has thus far, as respects this traffic, been declared and held to be a crime. Over this branch of the traffic, the government has hitherto assumed and exercised entire and exclusive authority and control. No one could engage in it at all, without a special license acknowledging the government as the source of the right. All others were rigidly excluded, and natural right, if such there be more than in name, in regard to mere traffic in property, between individuals, in a civilized and organized society, entirely extinguished. No person was entitled to a license without possessing certain prescribed, moral and other qualifications, to be certified on the face of the license. The permission, when granted, only conferred limited and partial rights and privileges, which could

Wynehamer v. The People.

not be exceeded by the holder, without the forfeiture of his privilege, and amenability to punishment for crime.

A grocer, under his license, could only sell to persons to carry away. He could not sell it, nor allow it to be drunk upon his premises. The tavern keeper, on the contrary, under his license, could not sell to a person to carry away. He could only sell to be drank in his house, or upon his premises. Very few persons could ever engage in one branch of this traffic, that of selling to be drank at the time of sale. To enable a person to obtain this species of license, he must propose to keep a tavern; the commissioners must be satisfied that he was of good moral character, and was of sufficient ability to keep an inn, or tavern; that he had the necessary accommodations to entertain travelers, and that a tavern was absolutely necessary for the actual accommodation of travelers, at the place where it was to be kept. In addition to all this, he was required to give a bond to keep an orderly house, and not to suffer certain practices in it. If he trusted any one for liquor, more than the sum of one dollar and twenty-five cents, unless he was actually a lodger in his house, or a traveler, not residing in the same city or town, he could not recover it by action. All securities taken for it were void, and he was liable to forfeit double the amount thus attempted to be secured. All persons (those having a license as well as others,) were absolutely prohibited from selling or giving away, any quantity to an Indian in this state, or to a person designated and described, by the overseer of the poor of a town, as an habitual drunkard, after notice served by such overseer, or by any clerk, agent, or member of the family of the person thus designated.

In short, it will be seen that in nothing has the power of the government been more uniformly and steadily exercised, from the beginning, than in hedging about and placing guards, restrictions and prohibitions upon the traffic in intoxicating liquors, to the exclusion of all mere natural rights, and that too for the purpose of preventing, as far as practicable, the very evils sought to be prevented by the act in question. Con-

Wynehamer v. The People.

gress has uniformly exercised the same power in reference to the traffic in the territories of the United States.

It was admitted fully, on the argument, by the learned counsel for the plaintiff in error, that the legislature might restrict and control the traffic to the extent to which it had exercised the power before this act, and that all former acts on this subject were valid, constitutional acts.

This concession, which might well be made, in respect to the exercise of a power and the pursuit of a policy by the legislature, under every constitution from the origin of the government to the present, and which was practiced under the colonial government for at least half a century before the revolution, seems to me to cover the whole ground of the controversy. It will be seen from the above brief summary, that the power heretofore exercised was identical, in kind, with that exercised in passing this act, and differs only in degree. The principle and policy upon which the former legislation was founded, has been extended. Nothing more. The constitution certainly creates no distinction in regard to the exercise of legislative powers between the different branches of traffic, and who shall say that the whole of any traffic is more exempt from legislative supervision and control than a part? If in the retail traffic, the legislature may constitutionally say who may sell and who may not, and for what objects and purposes, and to what class of persons sales may and may not be lawfully made, why not in the wholesale? There is no difference in principle.

“Questions of power,” says Chief Justice Marshall, in *Brown v. State of Maryland*, “do not depend upon the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.”

The principle which will authorize the prohibition of the sale of four gallons, or any quantity less than five, in a single bargain, will authorize the prohibition of the sale of less than a hundred gallons, or a thousand, at one time, and indeed any sale whatever. The extent is a question of policy and expedi-

Wynehamer v. The People.

ency, not of principle. It becomes a question, not of the existence of the power, or the right to exercise it, but of the degree to which the public interests require its exercise. And this is necessarily a matter of legislative discretion, with which courts have nothing to do. It is too plain for argument that the right to sell four gallons is as sacred as the right to sell any other quantity, however large, and can be rightfully no more abridged or taken away. And the owner is no more deprived of his property in one case than in the other, except in measure and degree. If, therefore, it be conceded that former statutes on this subject were valid enactments, it is folly to contend that this act is unconstitutional, and to insist upon absolute, individual right to the transmission of property from one to another as paramount to the authority of government.

A distinction has been attempted to be drawn between the power to restrict, by way of regulation, and the power to prohibit. But this distinction, if there be one, is altogether too narrow and uncertain to serve as the test of the rightful exercise of a power, like that of making laws for the government of a state. The right to restrict and regulate includes that of prohibition.

The power to regulate is conceded, but the power to prohibit is denied. Amongst the powers conferred upon congress by the constitution of the United States, is that "to regulate commerce with foreign nations among the several states, and with the Indian tribes." Under this power to regulate it was held by the Supreme Court of the United States, in *Gibbons v. Ogden*, 9 *Wheat.* 1, that congress had entire and exclusive jurisdiction over the whole subject, of the commerce specified, and all its channels, agencies and incidents. In the exercise of this power to regulate, it has repeatedly passed acts far more sweeping, prohibitory and stringent in their character and operation than the act in question. It is by virtue of this authority to regulate that the embargo and non-intercourse acts, with their severe penalties, were enacted. And also the

Wynehamer v. The People.

acts prohibiting, totally, citizens of the United States from selling ardent spirits to the Indians in the territories, on pain, in case of a violation, of forfeiting not only all the liquor in the possession of the trader, but all other goods in his possession of every description. But a more conclusive answer is, that the constitution makes no such distinction, and imposes no such limitation. The constitution goes no further in this direction, than to restrain the legislature from depriving any person of his property without due process of law, leaving it free to regulate, restrict and prohibit, to any extent, short of that, required in its judgment for the public good.

This whole controversy, so far as it involves any question of principle, is narrowed down to a struggle for the right of the individual to traffic in whatever the law adjudges to be property, at his discretion, irrespective of consequences, over the right of government to control and restrict it within limits compatible with the public welfare and security.

Everything beyond this is merged in considerations of expediency. This right of the owner to traffic in his property, never was, since the institution of society, a right independent of the control of government. It is a right surrendered necessarily to the government by every one when he enters into society and becomes one of its members.

A government which does not possess the power to make all needful regulations, in respect to its internal trade and commerce, to impose such restrictions upon it, as may be deemed necessary for the good of all, and even to prohibit and suppress entirely, any particular traffic, which is found to be injurious and demoralizing in its tendencies and consequences, is no government. It must lack that essential element of sovereignty, indispensably necessary to render it capable of accomplishing the primary object for which governments are instituted, that of affording security, protection and redress to all interests, and all classes and conditions of persons within their limits.

If, therefore, the act in question was what is claimed against it, a naked prohibitory act, suppressing the traffic in this species of property altogether, which it clearly is not, the presumption

Wynehamer v. The People.

would be that it was deemed by the legislature, necessary for the public welfare, and I know of no power which could abrogate it, except that by which it was enacted.

If its validity could be made to depend in any degree upon the fact that the traffic is productive of the evils attributed to it, intemperance, pauperism and crime, a fact which is scarcely denied or questioned by any one, that fact has been established by the legislature. The conclusion of the legislature, upon this question of fact, is final and conclusive, upon all courts, and all persons, as long as the statute remains unrepealed. And the proposition that the government does not possess the power to protect itself and its citizens, to whom it owes protection as a primary and paramount duty, against the consequences of such a traffic, by prohibiting the traffic itself, is monstrous, and strikes at the very foundation of all government.

The general maxim is that the will of the legislature is the supreme law of the land, and demands perfect obedience.

Although this rule does not fully obtain here, or in any government with a written constitution, placing restrictions upon legislative power, yet, "if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government." (1 *Kent Comm.* 441.)

It is claimed that courts independent of constitutional limitations, upon legislative power, have the right to annul statutes, and pronounce them void, whenever, in their judgment, they are in conflict with the fundamental principles of the government, and tend to individual oppression, although not in conflict with any provision of the constitution of the United States, or of the state.

I know of no such power vested in the courts, and they should never attempt to usurp it. The limitations upon legislative power are written in the fundamental law, and that is the standard by which all questions of power exercised by the legislature must be tried. To this extent the question is a legitimate one for adjudication by the courts, as the construc-

Wynhamer v. The People.

tion of the fundamental law necessarily falls within their province. Nor does this involve the philosophical absurdity, insisted upon by some writers, of the inferior power annulling the acts of the superior. Because upon our theory of government, the legislature is powerless when it attempts to pass the limits prescribed by the constitution. To this extent, under a written constitution, this power may be safely and properly exercised by the courts, and, indeed, its exercise often becomes necessary to prevent the encroachments of power, and to protect rights shielded by the constitution.

But, beyond this, such a power exercised by the courts, would be a mere veto or dispensing power. No such power is conferred by the constitution, nor does it pertain to the judicial functions.

Lord Campbell, in a recent case, (*Woodworth v. Watts*, 2 E. & B. 457; 75 C. L. R.) emphatically disclaims any such jurisdiction on the part of the English courts as that habitually exercised by our courts in this respect. Indeed, without a written constitution, it has no foundation to stand upon.

Should the time ever come, when the courts, instead of promptly sustaining and enforcing the legislative will, become forward to thwart and defeat it, and assume to prescribe limits to its exercise other than those prescribed in the constitution; to substitute their discretion and notions of expediency for constitutional restraints; and to declare enactments void for want of conformity to such standards; or when, to defeat unpalatable acts, they shall habitually resort to subtleties, and refinements, and strained constructions, to bring them into conflict with the constitution, the end of all just and salutary authority, judicial as well as legislative, will not be remote. When men chafing under the restraints of particular statutes, and prompted by interest, passion, appetite or partisanship to disregard them, and set their authority at defiance, once begin to expect from courts immunity and protection, instead of punishment, the judiciary will have lost, not only its claim to respect and confidence, but the power of enforcing general laws. Courts can only sustain their own authority and efficiency, by

Wynehamer v. The People.

vigilantly and fearlessly upholding and sustaining legislative enactments in all cases, where they are not plainly and clearly in derogation of constitutional limitations. The people have a far more certain and reliable security and protection against mere impolitic, overstringent or uncalled for legislation, than courts can ever afford, in their reserved power of changing annually and biennially, the representatives of their legislative sovereignty. And to that final and ultimate tribunal should all such errors and mistakes in legislation be referred for correction.

As there is nothing, therefore, in the constitution, either of this state or of the United States, which takes away or limits the rights of the legislature to make such regulations in regard to the traffic in property amongst the citizens of the state, and to impose such restrictions and prohibitions upon it as it shall deem necessary for the public good; this act, so far as it restricts and prohibits the sale of intoxicating drinks, must be pronounced a valid, constitutional act, and entitled to obedience from every citizen of the state.

Several other questions were discussed upon the argument, but as they have no bearing upon that portion of the act which applies to this case, it is unnecessary to notice them here.

I am accordingly of the opinion that the conviction should be affirmed.

WRIGHT, J.—1st. The defendant was indicted, tried and convicted at a court of General Sessions, for selling intoxicating liquor, in violation of the provisions of the act entitled "An act to prevent intemperance, pauperism and crime." There are but two questions in the case." 1. The power of the legislature to enact laws which shall affect the traffic in intoxicating liquors, and absolutely prohibit such traffic, if in the judgment of the lawmakers the interests of the state demand it. 2. Whether the last clause of the first section excepts from the operation of the act, imported liquors. The last is scarcely a question, as all the judges agree, that imported liquors are not excepted, unless in the hands of the importer, in the original

Wynnehamer v. The People.

package, and which have not been mingled in the general mass of property of the state.

2d. All legislative power is vested in a senate and assembly, subject only to such limitations and restrictions on the exercise of such power as are imposed by the constitution. The making of laws is the highest exercise of sovereignty, and there is no limitation upon such exercise unless it be found in the constitution, either in express terms or by necessary implication. This position is conceded by a majority of the court. The legislature possess the power not only to regulate the traffic in a particular article of property, but to prohibit the traffic altogether. They had the power to enact the act in question unless it conflicts with some constitutional provision. This also is conceded by a majority of the court. The only question, therefore, is whether the exercise of legislative power as evinced in the prohibitory clauses of the act, conflict with any constitutional provision.

3d. The prohibitory clauses are not in hostility with that abstract declaration of fundamental right, viz: that no person shall be deprived of life, liberty or property, without due process of law. I have been at a loss to perceive how this provision can be applied in restraint of the power attempted to be exerted in the first and other sections of the act relating to prohibition, or how applying the prohibitory clauses to the touchstone of this constitutional provision, the former are void. To restrain or prohibit the sale of liquors, or even keeping them, under such restraint as the law-makers may impose, and making the sale or keeping in prohibited places, an offence, is not an enactment, within the sense of the constitutional provision, *depriving* a person of his *property* without due process of law.

This right, which is declared fundamental, was extorted by *Magna Charta*. It was originally a limitation upon arbitrary power, and as much concerned the life and liberty of the subject as his property. Indeed more, as life and liberty were more valuable than property. It secured the right that no man should be *deprived* of life, liberty or property, without judicial

Wynehamer v. The People.

investigation and judgment. This is all that it meant in *Magna Charta* or the statutes of England, and all that it means in our constitution. It is aimed at any *actual* deprivation of life, liberty or property by the direct exercise of power, whether executive or legislative, and not by any constructive deprivation, through the operation of acts to promote the public well being, or even creating offences hitherto unknown to the law.

A law, the tendency of which may be to lessen the value of a particular article of property, or even making it an offence to keep it in certain places, is not depriving one of his property within the meaning of the provision. That is not the right protected from legislative invasion. The citizen, or subject of government, is not to be deprived of life, nor liberty, nor his property, by arbitrary fines, forfeitures, confiscations, attainders or the like, without judicial sentence. This is the right secured, and all of it. The restraint upon legislative power extends no farther than that the legislature shall not enact a statute which, in the terms of the act itself, creates an offence or forfeits property, convicts the offending party, and pronounces judgment upon him without the interposition of the judicial authority of the government. I can not therefore perceive how the prohibitory clauses of this enactment are in conflict with the constitutional provision referred to; or how similar provisions applied to liquor as an article of property, would be valid as not falling within the constitutional inhibition, if such property be acquired subsequently to the act taking effect. Indeed, I can not see how the question as to when the property is acquired can effect the construction of the constitutional provision, or how an enactment may not fall within the restriction if applied to subsequent acquisitions, and does fall within it as to existing property. Would an act be valid that deprived a person of liberty subsequently acquired, and invalid as to the right to liberty existing at the passage of the act? Yet the deprivation spoken of relates as much if not more to liberty as to property.

4th. There is no other question in this case than the one

Wynehamer v. The People.

whether the prohibitory clauses of the act in question conflict with the constitutional provision referred to. I think they do not. It follows, therefore, that the legislature have power to absolutely prohibit the traffic in intoxicating liquors, or even to restrict as to the places in which it may be kept, without regard to the question as to when property in the article was acquired.

5th. The point does not arise in this case whether the constitutional provision that the trial by jury, except as heretofore used, shall remain inviolate forever, is a restraint upon the legislature against creating a court of Special Sessions to try offences under the act, and exclude the offender from the right of trial by a common law jury. It does, however, arise in the *Toynbee* case, as the party asked to give bail to appear at the General Sessions. I do not think that the section of the act empowering courts of Sessions to try offences under the act, conflicts with the constitutional provision.

6th. The question of the validity of some of the provisions for executing the act, is not in either case, such as the authority to search for and seize liquors suspected to be kept in violation of the act. I entertain great doubts whether these latter provisions can be upheld; but not for the reason that they are repugnant to the clauses of the constitution referred to, but to another clause in that instrument. It is unnecessary, however, to pass upon the question.

7th. I concur with my brother Johnson, that the judgment of the General Sessions should be affirmed.

In determining this case, the Court of Appeals laid down and affirmed the following propositions:

1. That the prohibitory act, in its operation upon property intoxicating liquors existing in the hands of any citizen of this state when the act took effect, is a violation of the provision in the constitution of this state, which decrees that no person shall be "deprived of life, liberty or property, without due process of law." The court is of opinion that the various provi-

Wynehamer v. The People.

sions, prohibitions, and penalties contained in the act substantially destroy the property in such liquors, in violation of the terms and spirit of the constitutional provision.

2. That inasmuch as the act does not discriminate between such liquors existing when it took effect as a law, and such as might be acquired by importation or manufacture, and does not countenance or warrant any defence based upon the distinction referred to, it can not be sustained in respect to any such liquor, whether existing at the time the act took effect, or acquired subsequently; although all the judges were of opinion that it would be competent for the legislature to pass such an act as the one under consideration (except as to some of the forms of the proceeding to enforce it,) provided such act should be plainly and distinctly prospective as to the property on which it should operate.

Judgment of the Sessions and Supreme Court reversed.

VOL. II.

62

COURT OF APPEALS. Albany, March, 1856. *Denio, A. S. Johnson, Comstock, Selden, Mitchell, Wright, Hubbard and T. A. Johnson, Judges.*

THE PEOPLE *vs.* THOMAS TOYNBEE. (a)

The act of April 9, 1855, entitled "an act for the prevention of intemperance, pauperism and crime," in its operation upon property in intoxicating liquors existing in the hands of any inhabitant of this state when the act took effect, is a violation of that provision in the constitution of this state, which declares that no person "shall be deprived of life, liberty or property without due process of law," for the reason that by the provisions, prohibitions and penalties contained in the act, it substantially destroys the property in such liquors.

Inasmuch as the prohibitory act does not discriminate between liquors existing when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant any defence based on such distinction, it can not be sustained in respect to any such liquor, whether existing at the time the act took effect or acquired subsequently.

It would be competent for the legislature to pass such an act as the prohibitory act (except as to some of the forms of proceeding to enforce it) provided such act should be plainly and distinctly prospective, as to the property on which it should operate.

The proceeding in a court of Special Sessions authorized by the said act is unconstitutional and void, on the ground that the party accused is thereby deprived of the right of trial by jury guarantied by the constitution.

The expression in the constitution "due process of law" was intended to secure to every citizen, at least in criminal cases, the benefit of those rules of the common law, by which judicial trials are regulated, and to place them beyond the reach of legislative subversion. By SELDEN, J.

The first branch of the seventeenth section of the prohibitory act which provides that "upon the trial of any complaint commenced under any provisions of this act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of sale," is in violation of the constitutional provision which

(a) The reporter has thought it would be convenient for the profession in this state and elsewhere, to have, brought together, all the decisions made by the higher courts of this state, on the various provisions of the "prohibitory liquor act." He has therefore published in this volume, in addition to the decisions in the Supreme Court, the recent and final decisions of the Court of Appeals, by which the act was declared unconstitutional and void.

The People v. Toynbee.

secures to every person a trial by due process of law, inasmuch as it authorizes a presumption of guilt, when the common law would presume innocence. Per SELDEN, J.

The legislature has no power to subvert that fundamental rule of justice, which holds that every man shall be presumed innocent until he is proved guilty. Per SELDEN, J.

The second branch of the seventeenth section of the act, which provides, that upon the trial of a complaint for an unlawful sale of liquor, the defendant shall not be permitted to justify under the second section, unless he shall admit the sale, swear that, at the time he sold the liquor, he believed it was not intended to be used in a mode forbidden by the act, and set forth the reasons on which his belief was founded, is a violation of that provision of the constitution of this state which secures to the party accused the right "to appear and defend," and of that which declares that no person "shall be compelled to be a witness against himself," and is therefore void. Per SELDEN, J.

The last clause of the first section of the prohibitory act does not except imported liquors from the operation of the act, after they have left the hands of the importer. Per HUBBARD and T. A. JOHNSON, JJ.

The prohibitory act, in prohibiting the sale of imported liquors, by retail, within the interior of the state, after they have left the hands of the importer, is not legally objectionable, as being in conflict with the revenue laws of the United States. Per HUBBARD, J.

That portion of the prohibitory act which authorizes the seizure and destruction of liquor where the prosecution or conviction of the owner is not contemplated, is unconstitutional and void, inasmuch as it deprives the citizen of his property, without "due process of law." Per HUBBARD, J.

The "legislative power" conferred by the constitution on the legislature is not subject to any judicial control beyond the restrictions specially declared in the constitution, if it be not so exercised as to invade the constitutional province of some other department of the government. Per SELDEN and A. S. JOHNSON, JJ.

The defendant was arrested without a warrant by John Matthews, the complainant, a police officer, under the twelfth section of the act entitled "an act for the prevention of intemperance, pauperism and crime," passed 9th April, 1855, for selling in his presence, a glass of brandy and a bottle of champagne, who seized the said liquors together with the vessels in which they were contained.

The defendant was taken before Daniel K. Smith, a police justice of that city, by the officer, and there charged by him in substance with keeping for sale and having in his possession with an intent to sell, intoxicating liquors, and with selling one

The People v. Toynbee.

glass of brandy and one bottle of champagne, contrary to the provisions of that act.

He moved to dismiss the complaint and for his discharge, on the ground that it did not appear by the complaint that any crime or offence had been committed by him, and on the further ground that the provisions of the said act were unconstitutional and void. This motion was denied. He thereupon stated to the justice that he did not request to be tried by a court of Special Sessions, but objected to such a trial, and he offered to give bail to appear at the next court having criminal jurisdiction. The justice refused to receive such bail, and required the defendant to plead to the charge, whereupon he pleaded not guilty. It was then proved by Matthews that the defendant, Toynbee, kept a hotel in Montague Place, near Court street, in the third ward of the city of Brooklyn, on the 17th day of July last; that he on that day, in a bar room in the basement of the hotel, kept intoxicating liquors for sale, and sold and received payment for one glass of brandy and one bottle of champagne wine; that both the brandy and champagne wine were intoxicating liquors, and that the champagne wine was imported liquor.

The court thereupon found the defendant guilty of selling and having in his possession with intent to sell intoxicating liquors, as charged in the complaint, adjudged him guilty of a misdemeanor, sentenced him to pay a fine of \$50 and the further sum of \$5.87 for the costs and fees of the judgment, and that he stand committed until such fine and costs were paid, not exceeding fifty-six days, and further adjudged that the liquors seized by the officer and described in the complaint be forfeited, and that a warrant issue for their destruction.

The defendant appealed from that judgment to the Supreme Court, sitting in the second district, when the judgment was reversed. (See *supra*, page 329.) The people appealed from the judgment of the Supreme Court to this court.

J. M. Van Cott for appellants.

The People v. Toynbee.

I. The sale of imported liquor in less quantity than the package of importation is contrary to the prohibitory act.

1. Such sale is not in terms excepted by the first section, and the twenty-second section, which defines and limits the more general expressions of the first, clearly restricts the exception to the original package.

2. The purpose which speaks through the entire language and frame of the act was to carry the prohibition up to the point where sales were permitted by federal laws and to stop at that constitutional limit. The exception should be read as if the act of congress and the effect interpreted into it by *Brown v. The State of Maryland*, were incorporated into it. (*See Brown v. Maryland*, 12 Wheat. 446.) This construction was adopted by the court below, and is necessary to suppress the mischief.

II. The prohibition is not total. (1.) It permits the liquor to be kept and to be used by its owner for any and every purpose. (2.) It permits an unlimited sale by the owner within this state, for three months, subject to existing laws. The prohibition was prospective and within the principle of the laws abolishing slavery and of the registration acts. (*See Varick v. Briggs*, 6 Paige, 323; *S. C. in error*, 22 Wend. 543.) (3.) It permits the owner to export the whole of it, at all times, thus partially closing the domestic market, but leaving the foreign open. Suppose it had closed the foreign and left open the domestic market, on the principle of the laws against the export of corn and bullion. (4.) It permits the domestic sale of imported liquor in the bulk of importation. (5.) It permits the sale (under license, and the validity of a license system is not denied,) of all the liquor within the state, for mechanical, manufacturing and medicinal purposes. (6.) It prohibits sales only *sub modo* and the keeping of liquor for such unlawful sale. (7.) The purpose of the act is not to take property or destroy it. All of it might be safe to the end of time with the law in full force. It takes no property, it destroys nothing, it punishes nobody; and *it is the policy* (as it will be the desired consummation of the act) *that nothing shall be destroyed or taken, and*

The People v. Toynbee.

that nobody shall be hurt. All this is very different from the rapacious seizure and destruction charged against the act.

III. The prohibitory act does not transcend the limits of the legislative power; and, indeed, every essential feature of the act is familiar to British and American legislation. The court must look at the legislative point of view. Its aim is to prevent, by punishing acts deemed demoralizing and destructive to society, i. e. to prevent intemperance, pauperism and crime. The *subject* and general *object* of the act are within the admitted scope of legislative power. The form of the act defining the offence and prescribing the punishment, is within the common formula of legislation; and all the remedies it provides have numerous precedents in British and American statutes. Assuming the liquor traffic to be a great evil, as the tremendous and alarming statistics embodied in the legislative inquiries and reports demonstrated it to be, the legislature deemed it proper to protect society from it by efficient laws. That intemperance, pauperism and crime are great evils may be assumed. That the traffic in liquor tends to increase those evils will be admitted. That the prohibitory act is designed and will tend to prevent those evils is also conceded. That it is competent to society to prevent such evils by laws will hardly be denied.

But the act is argued to be void for excess; it has gone a degree too far. Surely, that question of degree is not one of judicial cognizance. It is not raised upon the record as a question of fact, and our judicial system provides no mode for its determination by a court or jury. The question of degree, of how much, is always relative. Enough is what will produce the effect sought. How much is "necessary and proper" to produce a given effect, must be solely for the legislative discretion within constitutional limits. The degree of the law depends upon the degree of the evil, which may be ten times greater a year hence than now, and which may now be ten times greater than the court may suppose it to be. If the evil were ten times greater, would the act be *excessive in degree*? Yet the constitution has no sliding scale. The basis of fact

The People v. Toynbee.

assumed by the legislature must be assumed by the court in determining whether the act is constitutional or void.

IV. The prohibition does not violate the restrictive clauses of the federal or state constitution. (1.) Private property is not taken for public use. Fines for crimes and forfeitures for violation of belligerent rights and of revenue and other laws, stand upon a fundamentally different principle. (2.) Under it, no citizen of this state is "disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." (*State Constitution*, art. 1, § 1.) This provision only requires that there shall be a valid law, authorizing the thing to be done, and a valid judgment where a judicial determination is required by such law. (a) This provision is not a limitation on the powers of the legislature to define new offences. Things not nuisances by common law may be made so by statute. And whether a thing be a nuisance or not depends upon the finding by the jury of the facts, within the statute or common law definition, and not upon the opinion of a judge, whether the thing is intrinsically noxious. So things which are nuisances at the common law may be permitted by the legislature. (18 *Barb.* 22.) The validity of the act can not depend upon the question whether the word "nuisance" is used with technical accuracy, but upon the power of the legislature to subject certain things to be treated as prescribed. (b) Nor is any act affecting the alienability of property within this constitutional restriction. It is universally true that property is alienable. Statutes and other restraints upon contracts of purchase and sale are numerous. At common law, choses in action are not assignable. Land held adversely can not be sold. Some of the accustomed restraints depend upon the capacity of the parties, some upon the form and mode of the contract, some upon the nature of the property; but none have ever been thought to conflict with the constitution. (c) It has been generally conceded by anti-prohibitionists, that if there was an apparent necessity for the law, amounting to "probable cause," it is valid. Such a test is not

The People v. Toynbee.

sanctioned by authority: but the act is already valid within it. (d) It is not void as a despotic act outside of "republican form of government." (*Fed. Const. art. IV, § 4, 5; Howard's U. S. R. The license cases.*)

V. The prohibition is valid within the express grant of "legislative powers," and also upon the fundamental principles of political society and government. There are no limitations upon the legislative power, except in the state and federal constitutions. 1. As to the express grant. The grant is unlimited in its terms. (*Const. of 1777, § 2.*) "The supreme legislative power within this state shall be vested in two separate and distinct bodies of men." (*Const. 1822, art. 1, § 1.*) "The legislative power of this state shall be vested in a senate and assembly." (*Const. of 1846.*) The terms "legislative power" and "the supreme legislative power," are identical in effect and import the *whole* power. The power as large in substance as it can be conceived in idea—the sovereign and transcendent power of legislating for all coming generations and ages of the state in all the exigencies of society and affairs. Under the constitution, the state government takes all its powers not expressly or by necessary implication withheld. The legislative department was formed by British colonists on the model of the British parliament, and is coextensive with the power of parliament except as limited by the restrictive articles. The parliament was omnipotent. (*Coke, 4 Inst. 36; Lord Camden, 19; St. Tr. 1066; 1 Black. Comm. 160, et seq.; Sydney on Govt. ch. 3, § 44-5-6; De Lolme on Const. ch. 3, 7, 8; Kent, 1 Com. 320; Story, 2 Com. on Const. p. 15, § 432-3; 7 J. R. 488-9; Dash v. Van Kleeck, per Spencer, J.; 3 Dallas, 396, Colden and wife v. Bull, per Iredell, J.; 2 Kern. 212, per Denio, J.; 24 Wend. 250, People v. Fisher per Bronson, J.; 21 Wendell, 563; 1 Hill, 344; Br. Leg. Max. 6.*)

2. The legislative authority, thus asserted by the most eminent jurists and judicial writers, results from the very nature of civil society and government. (1.) Society is founded on

The People v. Toynbee.

the paramount law of self preservation. Its organism should therefore arm it against all internal and external foes. To that end there must reside somewhere in it the power to determine what is hostile to society, and what means shall be used to repel the danger. (*Sydney on Govt. Supra, Rousseau Soc. Camp. ch. IV; Rutherford's Inst. Book 11, ch. 3, § 1 to 5; Guizot's Hist. Rep. Govt. 442.*) In a pure democracy, that power resides in the collective people. In modern political societies, and especially in those formed on the English model, that sovereign power is lodged in the legislative department. (*See authorities under the first subdivision.*) It is confessedly lodged in no other department in our American system. Wherever lodged it may be as ample as when created by the collective people in a democracy. The people in a representative government, lose none of their collective force, but delegate it and exert it through their representatives. If the people have not delegated the power in question, it is because they did not possess it; and if they did not possess it, an express constitutional grant could not confer it upon the legislature. As the creative, energetic, perpetual providence of the state, having to provide for and preserve it through all changes, exigencies and ages of its existence, the legislative sovereignty must be vast, comprehensive, undefined. (*2 Hamilton's Works, 457.*) "The contingencies of society are not reducible to calculations; they can not be fixed or bounded even in imagination. Will you limit the means of your defence when you can not ascertain the extent or force of the invasion?" (*id. 457.*) "When you have divided and nicely balanced the departments of a government; when you have strongly connected the virtue of your rulers with their interests; when in short you have rendered your system as perfect as human forms can be, you *must* place confidence, you must give power," (and *see the numbers of the Federalist by Hamilton and Madison. Also for various illustrations of sovereign power, see 1 Bl. Com. 48-9, 51-2, 147; Vattel, Book 1, ch. 1, § 42; id. ch. 3, § 26, 38; id. ch. 20, § 240, 244; Grotius, De Jure Belli et Pacis, book*

The People. v. Toynbee.

1, ch. 14, § 7; *id.* Book 3 ch. 22, § 7; *Puffendorf, L. Nat. and Nat. Book 8, ch. 5, § 1, 3, 4, 6, 7; Thomas's Univers. Jur.* 165-6, 170-1.)

(2.) The transcendent character of the legislative power is proved by various other considerations. (a.) The office of written constitutions is not to create but to distribute the powers of government, and to limit them when absolute discretion may be dangerous. (b.) The restrictions upon legislative power are enumerated in the constitution. *Expressio unius exclusio est alterius*. (c.) The restrictions are upon the fundamental points, and upon the only points where limitation was deemed necessary, practicable or safe. (d.) Those restrictions have been added and removed from time to time by constitutional amendments as the people have deemed necessary. (e.) Some of the legislative powers are admitted to have no limit but discretion; such as the power of war, of taxation, &c., which are far more potent for destruction than that of prohibitory legislation. (f.) The whole domain of legislation is one of policy, opinion, discretion—and discretion is in its very nature, *exclusive*. 1. *Executive* discretion, (12 *Wheaton*, 28.) 2. *Judicial* discretion. It is a settled principle of the courts, that error does not lie upon a judgment in a matter of discretion. 3. *Legislative* discretion, (3 *Paige, Beekman v. Sar. & Schen. R. R. Co.*) The legislature is the exclusive judge of the necessity for taking private property for the *quasi* public use of a rail road. 4. The principle seems to be a universal one in our jurisprudence. (1 *How. U. S. R.* 110; *Lawrence v. Minturn, per Curtiss, J.*) “It (a jettison,) will be deemed to have been necessary for the common safety, because the person to whom the law has entrusted authority to decide upon and make it, has duly exercised that authority. (g.) The limitation of the executive and judicial departments, which have no capacity to make laws. They only interpret, apply and execute those made by the legislative department. (h.) The judiciary has no rule but the constitution, by which to test the validity of a statute. Beyond that, the conflict is

The People v. Toynbee.

one of opinion which is too uncertain and fluctuating for so high an exertion of the judicial power. (i.) It is no answer to say, that a power so absolute is susceptible of abuse. That is true of all the powers of all the departments. The remedy lies in official responsibility, in short terms of office, and in the power to impose constitutional restrictions. This is the *vis medicatrix* of the representative system, and fully adequate to correct the occasional aberrations of power to which the best governments are liable.

(3.) The legislation on the subjects of crime and police, in England and by the state and federal legislatures, has been uniformly in accordance with these principles from the earliest times. Crimes are offences against society and to be punished, not compensated or protected. (2 J. R. 457; *The People v. Barker*, 4 Cow. 686, S. C.) There is no constitutional distinction between *malum prohibitum* and *malum in se*. The codes of crimes and and all health and police laws stand upon this basis. And the principle applies equally to laws affecting the person and property. (4 Bl. Com., ch. 13, "Of offences against the public health and the public peace or economy." 2 R. S. 881, title "Misdemeanor." 1 R. S. 848, title "Regulations for preserving the public health;" *id.* 818, title "Quarantine," &c., in the port of New York; 2 R. S. 6, "Of the internal police of the State, 21 titles; see title 9, "Of Excise," &c.; 2 R. L. of 1813, p. 368, § 1, p. 369, § 83, for destruction of buildings to prevent spread of fire; 18 Wend. 126, *The Mayor v. Lord*; 2 Denio, 461, *Russell v. The Mayor*; 5 Mass. R. 437, *Commonwealth v. Sessions of Norfolk*; 9 *id.* 388, *Same v. Sessions of Middlesex*; *Laws regulating intramural burials*, &c., 7 Cowen, 588, *Stuyvesant v. New York*, *id.* 388, *Vanderbilt v. Adams*; 2 Metc. 329, *Commonwealth v. Dana*; 12 Pick. 184, *Baker v. Boston*; 11 Metc. 58-9; 6 *id.* *Commonwealth v. Tewksbury*; 33 Maine, 560, *Preston v. Drew*.) Prospective appropriations of private property for public use. (17 Wend. 649, *Multon v. Furman street*, S. C. in *Court of Errors*, in 1842; *Jackson v. Brooklyn*, *Hicks v. Brooklyn*, *Court of Errors* in 1843.) Incidental damage to property in making public improvements.) 1 Comst.

The People v. Toynbee.

195, *Radeliff's Exrs. v. Brooklyn*.) Excise laws. (1 R. S. 85; *Laws* 1845, p. 322, *No license act*; 5 *Denio*, 70, *People v. Townsey*, 1 *Gray R.* 1, *Fisher v. McGive*; 5 *How. U. S. R.* 504. *The license cases, per Taney, Ch. J.*, p. 577; *McLean, J.*, p. 591; *Grier, J.*, p. 631-2; *The People v. Quant*, in 4th dist.; *The People v. Wynehamer*, in 8th dist.

VI. The mode of trial and adjudication prescribed by the act is constitutional. Section 1 of art. 1 of the state constitution does not secure a common law jury in all cases affecting liberty and property. The judgment of any competent court, whether of impeachment or admiralty, or equity or of law, by a single judge, or referee, or statute jury, is a "judgment of his peers" in numerous cases. Trial by jury has been "heretofore used" in the sense of section 2 of art. 1, in trials of offences under the grade of "infamous crimes." Trial by a common law jury is secured by the constitution only in the case of capital or otherwise infamous crime. (*Const.*, art. 1, § 6; *Forsyth Hist. of Trial by Jury*, ch. 5, § 3; ch. 7, § 3; ch. 9, § 2; *Creary on the Const.* 148 to 153 and notes; *id.* 166, 170, 208 to 228; *Bill of Rights*, § 12; 1 *Barn. & Ad.* 405.) The offences defined by the prohibitory act are not "infamous crimes," and the trial in such cases may be by a single magistrate or a statute jury. (4 *Bl. C.* 5,) "In common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the general name of misdemeanors." Misdemeanors are punishable only by fine and imprisonment in a county jail. (2 *R. S.*, *Misdemeanors*.) Infamous crimes are punishable by death and imprisonment in a state prison. (See 2 *R. S.* 886, § 34-5-6-7, for definitions of "felony," "crime," "offence," and "infamous crime.") The distinction between "crimes" and "infamous crimes" is already marked. (*Fed. Const.* art. V. of Amendments *State Const.*, art 1, § 6; and see 2 *Cowen*, 815, *Murphy v. The People*; *id.* 819, note, *Jackson v. Wood*; 5 *Wend.* 251, *People v. Goodwin*; 15 *id.* 451, *Rathbun v. Sawyer*; 10 *id.* 446, *Matter of Smith*; 1 *Hill*, 355, *Duffy v. The People*; 6 *Hill*, 75, *S. C.*; 24 *Wend.* 337, *Lee v. Tillosson*; *The*

The People v. Toynbee.

People ex rel. Booth v. Fisher, in 7th dist.; The People v. Wynehamer, in 8th district.)

VII. The seizure and the judgment of fine and forfeiture were authorized by the constitution and the act. There was due process of law.

VIII. The judgment of the Supreme Court should be reversed and that of the Special Sessions affirmed.

John A. Lott, for the defendant.

I. Neither the sale of the champagne wine nor keeping the same for sale was prohibited.

The section of the act, by which the offence is created, (section I,) expressly declares that it "shall not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States."

The right to sell imported liquor is so given. (*McCulloch v. The State of Maryland*, 4 *Wheaton*, 316; *Brown v. State of Maryland*, 12 *Wheaton*, 419, &c.; *License Cases*, 5 *Howard's Rep.* 504, &c.)

This exception applies to the liquor itself without reference to the quantity or condition in which it may be sold, or the persons by whom the sale may be made and is not restricted to liquor while in the "original packages" in the hands of the importer.

There is nothing in the section requiring or justifying any other meaning to the term "liquor," when used in the last clause containing the exception, than that given to it, when used in the first clause containing the prohibition. The reference to the laws and treaties of the United States is manifestly, not for the purpose of restricting the mode of sale, but merely for the purpose of designating the kind of liquor exempted from the application of the section.

The provision in the twenty-second section declaring that the act shall not "be construed so as to prevent the importer of foreign liquor from keeping or selling the same in the

The People v. Toynbee.

original packages, to any person authorized by this act to sell such liquors" is not in conflict but in entire harmony with this construction of the first section.

It may, indeed, be rendered superfluous and nugatory, but that will not authorize a more restricted meaning to be given to the clause containing an exception from the highly penal provisions of this act than the language and terms of the clause itself give to it.

II. If the exception be so construed as to permit the keeping and selling imported liquor only by the importer, in the original packages, then the act is repugnant to the constitution of the United States, and acts of congress passed under it.

(a.) It is a direct interference with the power of congress to regulate commerce with foreign nations. (*Constitution of U. S. s. 8, sub. 4.*)

"Commerce is intercourse; one of its most ordinary ingredients is traffic. Sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, as importation itself. It must be considered a component part of the power to regulate commerce. The right to sell is connected with the law permitting importation as an inseparable incident." (*Opinion of Chief Justice Marshall, Brown v. State of Maryland, above cited.*)

Any state law, therefore, prohibiting or restricting the sale of an article imported prohibits or restricts, to the same extent, its introduction into the country as a necessary consequence. No goods could be imported if the sale of them after importation was prohibited.

The law in question if applicable to imported liquor, prohibits its sale as an article of commerce and general traffic.

Section 22 permits the sale to a limited class of purchasers, only (to such persons as are authorized by the second section of the act to sell,) for certain specific purposes.

If, however, the exception in the first section be so construed

The People v. Toynbee.

as not in terms to limit a sale of the liquor in the "original packages" by the importer to such a restricted class of purchasers, yet its effect and practical operation is the same.

No other persons could buy it for the purpose of selling it or keeping it to be sold, as the effect of a sale by the importer, would be immediately to subject it, (although still contained in the original packages) to the provisions of the act and make the purchaser liable to all its penalties.

This would defeat the object for which it is imported, and thus the power of congress to authorize this traffic, although given in the most comprehensive terms with the intent that its efficacy should be complete, would cease at the point where its continuance is indispensable to its value. A law producing such results is repugnant to such power and void.

(b.) It is also an interference with the power of congress to levy and collect duties, imposts and excises.

The necessary effect of the law is to prevent the importation of foreign liquors, and thus deprive the general government of raising revenue, by the imposition and collection of duties.

III. The act is repugnant to the constitution of the state of New York.

1. It is in violation of the first section of article I, which provides that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers," and also of that part of the sixth section which declares that no person shall be deprived of liberty or property without due process of law.

The terms "the law of the land," and "due process of law," mean a proceeding according to the course of the common law; a trial according to the known and established forms and rules for establishing guilt or determining the title to property and a judicial sentence, not merely a statutory enactment passed for accomplishing the wrong. (*Taylor v. Porter*, 4 Hill, p. 145-6; *Sackett v. Andros*, 5 Hill, p. 358-9; *Westervelt v. Gregg*, 2 Kernan, 209-212; *Hoke v. Henderson*, 4 Dev. p. 1; *Green v. Biddle*, 8 Wheaton, 175; *Bronson v. Kinzee*, 1 How.

The People v. Toynbee.

Rep. 11; *Holmes v. Lansing*, 3 *John. Cases*, 75; *Morse v. Gould*, 1 *Kernan*, 281; *Greene v. Briggs*, 1 *Curtiss*, 311; *Saco v. Wentworth*, 37 *Maine Rep.* 165; 1 *Black Com.* p. 55; 2 *Kent Com.* p. 13; 2 *Inst.* p. 50; 3 *Story on the Constitution*, s. 1783.)

The property affected by the act is not only declared by section 25 to be a public nuisance, but the natural and unavoidable effect of the act, is to render the property useless and unavailable to its owners as an article of traffic, and in the manner in which it has heretofore been used and disposed of.

At the time the act took effect, great numbers of the citizens of the state had by manufacture and purchase, acquired and become the owners of, and, therefore, had vested rights in large quantities of liquors, wines and ales, the value of the principal part of which, will be entirely destroyed, if the act be sustained. (*See sections 1, 4, 6, 7, 10, 12.*)

The twelfth section of the act authorizes and directs the seizure of property to an unlimited amount by every sheriff, under sheriff, deputy sheriff, constable, marshal or policeman, however irresponsible, without making any provision for securing the return thereof, to the owner in any case.

2. The fifth section of the act directing a trial of the accused by a court of Special Sessions, is in violation of the sixth section of article I, of the constitution, which provides that no person shall be held to answer for an infamous crime, (except in cases of petit larceny and certain other specified cases,) unless on presentment or indictment of a grand jury.

The term "infamous crime," as there used, is not restricted to "offences punishable with death, or by imprisonment in the state prison," (the meaning given to it when used in a statute.)

Petit larceny and the other excepted cases, are not so punishable, yet by well settled rules of interpretation, they are, by force of the exception, included in that term, as understood by the framers of the constitution.

The offence created by this act, works a forfeiture of the prohibited article, and renders the offender incompetent to act as a juror upon any trial under the provisions of the act. This

renders the offence infamous. (1 *Phillips on Evidence*, p. 28, &c.; 4 *Blackstone's Com.* p. 94, 97; *Starkie on Evidence*, part 4, p. 714; 1 *Chitty's Criminal Law*, p. 599.)

3. The fifth section of the act, limiting the right of trial to six jurors, is also a violation of section two of the same article, which declares that "a trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever." The right thus secured, is a trial by twelve men. (*Taylor v. Porter*, 4 *Hill*, 140; *Cruger v. The Hudson River Railroad Co.* 2 *Kernan R.* 198; see also, *Debates in the Convention of 1846*, *Argus edition*, p. 423, and *Atlas edition*, p. 118, 125, 544 and 547.)

To obviate objections urged against the requirements of a trial by a jury in all cases, a provision was added to this section of the constitution, that it "may be waived by the parties in all civil cases, in the manner to be prescribed by law."

The right of such waiver is excluded in criminal cases.

The words "in all cases in which it has been heretofore used," do not restrict this right to such offences only as were known at the formation of the constitution, and were then triable by a jury. Such a construction would give the legislature the power to deprive a party of a jury on the trial of all offences subsequently created, although punishable by imprisonment in the state prison, or even with death.

The provision should be construed in favor of liberty and personal rights, and so as to secure the right of trial by twelve men in all cases.

At the time when this constitution was adopted, the jurisdiction of courts of Special Sessions had become limited to petit larceny and a few other small offences, and even as to those, a trial by a jury of twelve men could always be secured by giving bail to appear at the next court of criminal jurisdiction.

4. But even if the act in question authorized the defendant to give bail, and thus secure a trial by a jury of twelve men, it was, nevertheless, a violation of the constitution. It imposes a restriction on the right not contemplated or justified by that instrument. (*Greene v. Briggs*, 1 *Curtis*, 311.)

The People v. Toynbee.

5. That provision of the constitution is also violated by rendering an entire class of citizens incompetent to serve as jurors upon trials of offences under the act in question, thus depriving the party of the full privilege of a trial secured in other cases. (*See opinion of Judge Pitman in Greene v. Briggs, above cited.*)

6. It violates section 5 of art. 1 of the constitution, by imposing excessive fines, and inflicting unusual punishments.

The fourth section of the act provides that every person who shall violate any provision of the preceding sections, shall forfeit all the liquor kept by him in violation of either of those sections, without regard to its value. The same section also directs the commitment of the defendant in case of default of payment of any part thereof, until the same are paid, "*not less than one day per dollar of the amount unpaid,*" thereby authorizing the imprisonment of the defendant for an unlimited time.

Previous to the passage of this act, it was expressly provided that no conviction of any person for any offence whatever except upon an outlawry for treason, should work a forfeiture of any goods, chattels, lands, tenements, hereditaments, or of any right or interest therein. (2 R. S. 701, § 22.)

The punishment inflicted, therefore, is unusual and in clear contravention of the provision referred to.

IV. The power of the legislature in the enactment of laws, (whatever it may be in other countries,) is not unlimited in this; it is restricted not only by the written constitution, but by limitations implied from the nature of our form of government; and the judiciary is the only tribunal by which it can be peaceably determined whether the legislature have transcended their authority. (*Opinion of Justice Chase, in Calder v. Bull, in 3 Dallas R. 386; Opinion of Chief Justice Marshall, in Fletcher v. Peck, 6 Cranch, 77; Opinion of Bronson, J., in Taylor v. Porter, 4 Hill, 146; Opinion of Senator Tracy, in Bloodgood v. The Mohawk and Hudson Railroad Co., 18 Wend. 56, 61, 62, 63; Opinion of Justice Hosmer, in Goshen v. Stonington, 4 Conn. 225; Wilkinson v. Leland, 2 Peters, 654; Smith's Commentaries on Statutory and Constitutional Construction, 258 to 289; 2 Kent's Commentaries, 329-349, Lecture 34, 2d ed.*)

The People v. Toynbee.

Those provisions of the act which authorize the seizure and destruction of private property, which prohibit its use for the purposes to which it is generally and principally appropriated, which declare that to be a nuisance and a crime which is in itself harmless, which assume the power to determine physical facts, as that all distilled and malt liquors are intoxicating, are unwarranted by any thing contained in the constitution, or in the delegated powers of the legislature.

What is a nuisance, and what is intoxicating, are questions for adjudication and not subjects of legislation; and the legislature have as much authority to declare wine when used for sacramental purposes, a nuisance, and pure water intoxicating, as to determine such to be the characteristics of liquor, when kept to be used as a beverage.

The prohibition by the act, so far at least as regards domestic liquor, is in effect absolute. No person can sell any quantity of it, except for purposes for which it is only accidentally useful, and in comparatively small quantities, and the sale of it, even then, is authorized by a limited portion of the community only, under restrictions inconsistent with the proper disposition of property.

V. No offence is charged in the complaint. When an exception from the operation of a general provision is embodied in that provision, or in other words, when exceptions are in the enacting part of the law, it must be averred in the charge, that the act complained of does not fall within the exceptions. (2 *Saunders on Pleading*, 257; *Vavasour v. Ormond*, 6 *Barn & Cres.* 431; 1 *Chitty's Crim. Law*, 283, 284, 285; *Teel v Fonda*, 4 *Johns.* 304; *Rex v. Jarvis*, cited in a note to *Rex v Stone*, 1 *East*, 639; *Hirn v. The State*, 1 *Ohio St. Rep.* 15.)

In the act in question, the exception in the first section by which the offence is created is included in the general expression "except as hereinafter provided," in the first line of the section, but more particularly in the last clause of it. The section was therefore in effect, that intoxicating liquor (except liquor the right to sell which in this state is given by any law of the United States) should not be sold or kept for sale, and

The People v. Toynbee.

by the rule referred to, it should have been alleged in the complaint that the liquor sold was not in the exception.

VI. The justice erred in refusing to take the bail offered by the defendant for his appearance at the next court having criminal jurisdiction. The right to give such bail is incident to all cases triable in a court of Special Sessions, and the refusal to receive it rendered the subsequent proceedings void. (*See opinion of Judge Rockwell in the People v. Berberich, at the end of the case.*)

VII. The judgment of the court of Special Sessions was erroneous: 1st, because it does not specify whether the appellant was convicted of selling the brandy or champagne, or which of them he was convicted of having in his possession with intent to sell; nor for what he was adjudged guilty of a misdemeanor; nor for what he was sentenced to pay the penalty of fifty dollars: 2d, because it adjudged that the champagne wine, which was proved to be imported liquor, was forfeited and should be destroyed: 3d, because it adjudged that the defendant stand committed until the fine and costs be paid, not exceeding fifty-six days.

VIII. The judgment of the court of Special Sessions was contrary to law and the evidence, and was properly reversed, and the judgment of the Supreme Court should be affirmed with costs.

SELDEN, J.—The question which lies at the threshold of this case, and which should be determined in advance of every other, is, whether the act for the prevention of intemperance, pauperism and crime, considered in reference to its object, the means adopted to secure that object, and its alleged effect in virtually annihilating a large amount of property, is void, as being without the pale of legislative power. It is claimed, 1. That irrespective of any positive restrictions, the principles of natural equity and justice set bounds to the power of the legislature, which are transcended by this law. And. 2. That it is in conflict with the express provisions of the constitution.

In examining this subject, speculative opinions in regard to the wisdom of the act, or the beneficial results likely to flow from it, can have nothing whatever to do with a question, which depends upon abstract principles of governmental law; principles which can not be moulded to meet the views or interests of any portion of the people. It is a question not of expediency, but of power.

Every sovereign state, possesses within itself, absolute and unlimited legislative power. It is true, that as government is instituted for beneficent purposes, and to promote the welfare of the governed, it has no moral *right* to enact a law which is plainly repugnant to reason and justice. But this principle belongs to the science of political ethics, and not that of law. There is no arbiter beyond the state itself, to determine what legislation is just. Whatever, therefore, is to be declared by the ultimate power of a state, as there can be no appeal, must in view of the law, be taken to be just and right. The union of the functions of making and deciding upon laws, constitutes of necessity absolute legislative power. While, therefore, the *right* of a sovereign state to pass arbitrary and tyrannical laws may, its legal *power* can not, be denied. This is self-evident, and needs no proof. I speak of course, of a state as a whole, where all its powers are *concentrated* in the hands of the people at large, or of one or more of its members.

It follows, that if a society of people wishing to form an organized government, should simply create the three essential departments, vesting *the whole* executive power in one, the legislative in another, and the judicial in a third; as the three departments combined would possess all the powers which belonged to the people in their collective capacity, the legislative department could make any law which the people themselves could have made, arbitrary, oppressive or otherwise; unless, under such a distribution of the governmental powers, some authority is vested in the judiciary, to pass upon the propriety or justice of the laws.

But it is evident that this is a legislative and not judicial power. It is necessarily to be exercised in the first instance,

The People v. Toynbee.

at least, when the law is passed, and obviously constitutes the most essential portion of the duty of the legislature itself. To suppose the same power vested in the judiciary, tends to confound the distinction between the two departments. Besides, when exercised by the latter, it becomes a supervisory and appellate power, and *thus virtually subversive of all legislation*. It is clear, therefore, in my judgment, that in a perfectly *natural and simple* distribution of the governmental powers, it is not within the province of the judiciary to pronounce *any* act of the legislature void. It may, however, acquire this right through an artificial distribution of those powers, by means of the organic law.

Let us look then at our state constitution. Section 1, art. 3, declares that "The legislative power of this state, shall be vested in a senate and assembly." This means of course *the whole* legislative power. The words are general and unlimited, nothing is reserved. It was decided by this court, in the case of *Barto v. Himrod*, (4 Seld. 483,) that the people had parted with all their power of legislation, except in the single case provided for in art. 7, sec. 12.

Why then, as it has been shown that the people could make any law just or unjust, is not the legislature equally absolute? It is because by other clauses in the constitution hereafter to be noticed, a portion of this absolute power has been transferred to the judiciary. Not, it is true, in direct terms; but the constitution, being the result of legislation by the people themselves, before parting with their power, is the paramount law. When, therefore, any law passed by the legislature, conflicts with this, the judiciary pronounces between them, as it does between the acts of two successive legislatures, and the paramount law prevails. It will be seen, that, in this mode, a restriction upon the power of the legislature is effected, without confounding the distinction between the two departments, as the judiciary continues to exercise only its appropriate judicial functions.

To determine then, the extent of the law-making power, we have only to look to the provisions of the constitution. It has,

The People v. Toynbee.

and can have no other limit than such as is there prescribed; and the doctrine, that there exists in the judiciary some vague, loose and undefined power, to annul a law, because in its judgment it is "contrary to natural equity and justice," is in conflict with the first principles of government, and can never I think be maintained.

I am aware that some eminent judges, when the question was not before them, have expressed a belief in the existence of such a power; but no court has ever, I believe, assumed to declare an explicit enactment of the legislature void, on that ground.

Blackstone, in his commentaries, after referring to the doctrine advanced by some other writers on this subject, that acts of parliament, "contrary to reason," are void, says: "But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with power to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that when the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above the legislative, *which would be subversive of all government.*" (1 *Black. Com.* 91.)

Christian, in his commentary upon this passage, says, "When the signification of a statute is manifest, *no authority*, less than that of parliament, can restrain its operation." (See note to *Black.*) These authorities, it is true, have reference to the British constitution; but the following relate to those of our own country.

Lieber, in his work on civil liberty and self-government, says, that the state legislatures have "the right, as a general rule, to do all that seems necessary for the general welfare, and is not *specially prohibited.*" He suggests no exceptions. (See *chcp.* 15, § 25.)

Mr. Justice Irdell, in the case of *Calder v. Bull* (3 *Dall.* 386,) when this question was incidentally considered, uses the following emphatic language: "If then a government, com-

The People v. Toynbee.

posed of legislative, executive and judicial departments, were established by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted; and the judicial power could never interpose to pronounce it void."

Chief Justice Church, of Connecticut, also, in the case of *The City of Bridgeport v. The Housatonic Railroad Company*, (15 Conn. R. 475,) expresses his views thus: "There may not often be any great difficulty in determining what are the principles of natural justice, nor what would tend to undermine that which theorists may suppose to be the fundamental principles of the social compact, especially by those who acknowledge the precepts and obligations of revealed religion; yet these principles are not always of easy and undoubted application to the infinitely varied forms of human action; and we know of no other municipal power, which can more safely make such application, than the legislature; and as a court, although we might dissent from its conclusions, yet *we disclaim any right to disregard them*, for no other reason, that we might consider them unreasonable, impolitic or unjust."

I agree with the learned chief justice, that this power of determining what laws are expedient and just, which must of necessity be lodged somewhere, may be as safely reposed in the legislature, which returns its power so frequently through the elections into the hands of the people, as in the judiciary. The remedy for unjust legislation, provided it does not conflict with the organic law, is at the ballot box; and I know of no provision of the constitution, nor fundamental principle of government, which authorizes the minority, when defeated at the polls upon an issue involving the propriety of a law, to appeal to the judiciary, and invoke its aid, to reverse the decision of the majority, and nullify the legislative power.

This brings me to the consideration of the second ground, upon which it is claimed, that the law, as a whole, is void, viz: that it is inconsistent with the letter, or spirit, of the express provisions of the state constitution. The particular

The People v. Toynbee.

clauses with which it is alleged to conflict, are those which provide: 1. That "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." 2. That no person shall "be deprived of life, liberty or property without due process of law."

The first of these clauses, which had its origin in Magna Charta, brief as it is, embodies the most essential guaranties against the exercise of arbitrary power which that instrument contained. Its meaning, as there used, is plain, when we consider that it was the result of a struggle which had lasted for more than a century, between the English people and the Norman kings, who had supplanted the laws and customs of the Anglo-Saxons and established in their place the prerogatives of royalty. The English yeomanry, at whose instance this clause was inserted, meant by the terms "law of the land" the ancient Saxon or common law. To put any other construction upon it, it would render the clause utterly unmeaning. At that period in English history, the king exercised legislative power; and if by "law of the land" was meant any law which the king might enact, the provision was a nullity.

But the meaning was rendered more clear by the paraphrase of this article of Magna Charta, which was inserted in a subsequent statute, securing privileges to the people, passed in the reign of Edward III, in which the clause "but by the law of the land, or the judgment of his peers," was changed to the words "without being brought to answer by due process of law."

This change shows that the object of the provision was, in part at least, to interpose the judicial department of the government, as a barrier against aggressions by the other departments. Hence, both courts and commentators in this country, have held, that these clauses, *in either form*, secure to every citizen, a judicial trial, before he can be deprived of life, liberty or property. (*Hoke v. Henderson*, 4 Den. 1; *Jones v. Perry*, 10 Yerger, 59; *Taylor v. Porter*, 4 Hill, 140; *Embury v. Conner*, 3 Coms. 54; 2 *Kent Com.* 13; 3 *Story Com. on the Cons.* § 1783.)

The People v. Toynbee.

Does the statute in question then, deprive any class of citizens of their property, without "due process of law?" Property is the *right* of any person to possess, use, enjoy and dispose of a thing. The term, although frequently applied to the thing itself, in strictness means only the *rights* of the owner in relation to it. (*Bouvier's Law Dic.* 1 *Black. Com.* 138; *Webster's Dic. &c.*) A man may be *deprived* of his property in a chattel therefore, without its being seized, or physically destroyed, or taken from his possession. Whatever subverts his *rights* in regard to it, annihilates his property in it. It follows, that a law which should provide in regard to any article in which a right of property is recognized, that it should neither be sold, or used, nor kept in any place whatsoever, within this state, would fall directly within the letter of the constitutional inhibition; as it would in the most effectual manner possible deprive the owner of his property, without the interposition of any court, or the use of any process whatever.

It may be said that the constitutional provision in question can not in the nature of things apply to a case, where a law enacted for beneficent purposes, operates *directly* upon its subject and thus accomplishes *per se* the end in view, that in such a case, it is impossible to interpose any judicial action between the enactment and its execution; and that the clause can only apply to cases where there is to be some manual interference with the rights of person or of property.

But there is no such limitation in the constitution; and the few guarantees it contains should not be curtailed by any narrow or refined process of interpretation. Such a construction would virtually nullify the provision; as the most oppressive and tyrannical ends may be accomplished, by simply withdrawing from individual rights the protection of law. All vested rights to franchises would be placed by this interpretation, so far as the state constitution is concerned, entirely at the mercy of the legislature. To give the clause, therefore, any value, it must be understood to mean that no person shall be deprived by any form of legislation or governmental action, of either life, liberty or property, EXCEPT AS THE CONSEQUENCE of some

The People v. Toynbee.

judicial proceeding, appropriately and legally conducted. It follows that a law, which by its own inherent force, extinguishes rights of property, or compels their extinction, without any legal process whatever, comes directly in conflict with the constitution.

Does the act in question do this?

I shall consider the objections to the first four sections, which embrace the prohibitory features of the act, with the specific penalties annexed to its violation, by themselves, as they have no necessary connection with those made to the subsequent sections. If these four sections *virtually deprive* the owners of spirituous liquors of their property, without legal process, they are void, if my interpretation of the constitution is sound.

It is not sufficient that they impair *the value* of the property, in ever so great a degree, because this *destroys* no right. It leaves to the owner *unimpaired*, his *right* to keep, to use and dispose of the article. It does not therefore *deprive* him of any right of property. All regulations of trade with a view to the public interests, may more or less impair the value of property, but they do not come within the constitutional inhibition, unless they *virtually* take away and destroy those rights, in which property consists; this destruction must be for all substantial purposes *total*. Not that a merely *colorable* preservation, of some minute and trivial interest, would uphold the act. A substantial right of property must be saved; and the provisions must be such, as may fairly be considered as intended to *regulate*, rather than subvert and destroy the property.

What then is the general scope and object of the first four sections of the act? Plainly, to prohibit the sale of intoxicating liquors, for all except *mechanical, chemical* and *medicinal* purposes and to limit their sale for those purposes, to a particular class of persons. Is there any thing in these objects, which *if properly carried out* would transcend the limits of the legislative power? I think not. The legislature, in my judgment, possesses the right to prescribe the places where the

The People v. Toynbee.

persons by whom, and the purposes for which, spirituous liquors may be sold, provided that under color of doing this, it does not virtually deprive the owner of his property in them.

So far as the places where, and the persons by whom, sales may be made, this act is perhaps more stringent than the excise laws which it supersedes. The increase of rigor is in the *purposes* for which such liquors may now be sold. But the privilege of selling for "*mechanical, chemical and medicinal purposes,*" is not, I think so trivial, as to be justly regarded as merely *colorable*. The consumption for the chemical and mechanical arts, must be considerable, and that for medicinal purposes, will be found, I apprehend to be still greater. Besides, as the law would operate to check the manufacture and importation of liquors, the stock on hand would, if permitted, have been ultimately required for purposes deemed by the law itself legitimate.

If then the law had suffered the liquors on hand when it went into effect, to be gradually absorbed by the then privileged uses, the prohibitory features contained in the first four sections would not, I think, have conflicted with the constitution. But there is one provision in the first section of the act which, when taken in connection with the fourth section, can not I think be reconciled with any just views of legislative power.

That section declares, in substance, first, that intoxicating liquors, except as afterwards provided, shall neither be sold, or kept for sale, or with intent to be sold, in any place whatsoever; nor be given away, or kept with intent to be given away, anywhere but in a private dwelling house. These provisions, although they abrogate the right of sale, do not prohibit the liquors from being kept, provided no design is entertained of selling them; nor do they prohibit their being *used* by the owner. So far the section may not conflict with the constitution. But it proceeds: "*nor shall it be kept or deposited in any place whatever, except in such dwelling house as above described, or in a church or place of worship for sacramental purposes, or in a place where either some chemical, or mechani-*

The People v. Toynbee.

cal, or medicinal art, requiring the use of liquor, is carried on as a regular branch of business; or while in actual transportation from one place to another, or stored in a warehouse, prior to reaching its place of destination.

This last clause is not qualified by any provision as to the *intent* with which the liquors are kept. It is an *absolute prohibition* against their being kept *anywhere*, but in the excepted places; although the owner may have no intention either to use, sell, or give them away; and the fourth section declares a violation of this clause to be a *misdemeanor*, and imposes a penalty of fifty dollars for the first offence.

Now what, under this law, is the condition of a person having spirituous liquors on hand, on the day when the law takes effect? These liquors, or the rights of the owner in them, are property, and as such entitled to the protection of the constitution. What then is the owner to do? If he does *nothing*—he is guilty of a misdemeanor; because it is a violation of the act, *to keep* the liquors *anywhere*, out of the excepted places, without reference to the interest of the owner. Unless therefore he obtains the right to sell, or deposits the liquor in one of the excepted places, he must *destroy* it, or be liable to indictment and punishment as a criminal. The act reduces him to this alternative. It does not permit him to dispose of his liquors, even to those authorized to sell. In this respect, it is inconsistent with itself. It admits the value of such liquors for certain purposes, and yet prohibits their sale for those very purposes.

If it be conceded that the legislature has not the power to pass a law directing a *sheriff* or other officer *to destroy* these liquors, wherever he can find them, without any process whatever, then the constitutionality of the provision under consideration, can not I think be maintained; because, there can be no material difference between directing an officer to destroy them, and directing the owner himself to do it; nor between enacting, in so many words, that the latter shall destroy them, and placing him in a situation which subjects him to conviction and punishment as a criminal, unless he does it. How is

The People. v. Toynbee.

it possible *to deprive* a man more effectually of his property, than to enact that he shall be deemed guilty of a misdemeanor, and be liable to a penalty, *if he keeps it for any purpose*? This is precisely what the legislature has in substance done; since the only doors of escape left open to the owner are entirely illusory. They are, either to qualify himself under sections two and three to sell, or to deposit his liquor in one of the excepted places.

As to the first, he may not be able to obtain the necessary security, or to make oath that he does not use intoxicating liquor as a beverage. The law does not make such use a crime; nor does the constitution withdraw its protection in consequence of it. Such a man, then, although disposed to submit to the law, and not to sell for any unauthorized purpose, can not save his property, even for those purposes which the law itself sanctions.

It may be said that he may remove the liquors to one of the excepted places. This might be done in some instances, and in small quantities. Some men own dwelling houses, and some do not. Some might have access to mechanical or manufacturing establishments, and some would not. But the legislature has no power to compel the destruction of even the smallest quantity of liquor without a previous judicial condemnation. The idea of depositing *all* the liquor on hand when the law took effect, in those excepted places, is plainly illusory. The suggestion that the owners might save their property by exportation is equally so. Admitting the right of the legislature to compel any class of citizens to remove their property out of the state, we can not know, judicially, that an article, the sale of which is prohibited, and which is declared a nuisance in our own state, would be admitted as an article of merchandise into any other.

While, therefore, I do not question the constitutionality of the general objects of the prohibitory law, and fully concede the power of the legislature to prohibit the sale of intoxicating liquors, for all except mechanical, chemical and medicinal purposes, I can not admit that it has the right to compel their

The People v. Toynbee.

immediate and unconditional destruction, as is, I think, substantially done by this law. The guaranties of the rights of property, which the constitution affords, as my investigations in this case have satisfied me, are slender at the best, and I am unwilling so to interpret as entirely to nullify them.

There is one other argument in connection with this branch of the case, which I will notice here. It is said that the legislature has the conceded power to authorize the destruction of private property in certain cases for the protection of great public interests; as for instance, the blowing up of buildings during fires, and the destroying of infected articles in times of pestilence; and that the legislature is necessarily the sole judge of the public exigency which may call for the exercise of this power.

The answer is, that the legislature does not in these cases *authorize* the destruction of property; it simply *regulates* that inherent and inalienable right which exists in every individual to protect his life and his property from *immediate* destruction. This is a right which individuals do not surrender when they enter into the social state, and which can not be taken from them. The acts of the legislature in such cases do not confer any right of destruction which would not exist independent of them; but they aim to introduce some method into the exercise of the right. (*See the able opinion of Senator Sherman in Russell v. The Mayor of New York, 2 Denio, 461.*)

It has never yet been judicially decided in this state, so far as I am aware, that the officers upon whom statutes of this kind purport to confer power to destroy buildings to prevent the spread of fires, would be justified in exercising the power in a case where it could not be properly exercised independent of the statute; and it may well be doubted whether the legislature can add to the extent or force of the natural right.

Again, the enactment of quarantine laws, by force of which not only is property destroyed, but personal liberty restrained, is the exertion, by the body politic, of the same power of self-preservation which is possessed by individuals. Their justification rests upon the *immediate* and *imminent* danger to life

The People v. Toynbee.

and health which they are enacted to avert. If we admit the truth and force of all the reasoning upon which the statute before us is based, it will still be impossible to bring it within the range of this power. As well might an individual argue, that because he has a right to protect his life or property from immediate destruction, he has therefore a right to resort to any measures he may deem necessary to guard against remote and contingent dangers. It is clear, therefore, that no argument drawn from these and kindred enactments, can be of any weight in determining the question here.

The conclusion to which I am thus brought, is necessarily subversive of the entire law in its present form. For, although when only a part of an act is unconstitutional, and that part is entirely separable from the remaining portion, the court will limit its condemnation to the part which conflicts with the constitution, yet this can not be done, where, as in this case, in a single section, several acts in relation to the same subject matter, and connected in one sentence are forbidden, and in another section all these acts are indiscriminately declared to be crimes, and *one common penalty* is annexed to each. The same provision can not be both valid and void, as would be the case if it should be held that the penalties imposed by section four could be enforced as to part of the acts prohibited in section one, and not as to others.

It may be said that although the legislature has not the power to annihilate *existing rights* of property in any article, it may nevertheless make it unlawful to acquire such rights in future; and may therefore enact that all rights of property in a particular article, *thereafter acquired*, shall be null, and that the article itself shall be destroyed; and hence that the present law may be enforced as to all rights not shown to have existed when the law took effect.

But conceding the power of the legislature to make such a law, it can not support the present act, which operates indiscriminately upon all rights of property in the article in question, without regard to the time when they were acquired.

To hold the law valid and operative as to property acquired

The People v. Toynbee.

after it took effect, and void as to rights previously existing, would tend to the constant recurrence of the question before the courts as to its constitutionality, and to *repeated judgments* of condemnation of the law. There are serious objections to this on the grounds of public policy, which requires that collusions between the different departments of government should be as few and as brief as possible. If the law was so framed, that proof on the part of the defendant that his rights of property involved in the case had existed before the act took effect, could be construed into a defence under the act itself, this objection would be removed. But it is clearly otherwise. Such proof would have no tendency to exempt the defendant or his property from the penalties of the law, except by calling upon the court to pronounce it unconstitutional. Thus the courts would be required over and over again to declare the same legislative provisions both valid and void, as applicable to different classes of cases. This has been in some instances, but with doubtful propriety, tolerated in purely civil cases, but never, I believe, in respect to penal and criminal legislation.

It is not only liable to the objection already suggested of calling into repeated action the ultimate judicial power of passing upon the validity of the acts of a coordinate branch of the government; but it would tend directly to encourage experimental legislation. If the legislature may in a single provision encroach *ad libitum* upon the constitution, without other effect than to call upon the courts to limit its operation to cases within the purview of legislative power, nearly all motive for a careful regard of constitutional rights in legislation would be removed and an onerous burden imposed upon the courts. The general rule on this subject is that where part of a law is in conflict with the constitution, and that part is entirely separable from the residue, so that other portions of the law can be enforced without reference to it, there the unconstitutional part only will be condemned. But where the legislative provision is indivisible, and the necessary discrimination has, as in this case, to be made at the trial, so that the rights invaded can only be protected by *repeated judgments* against the validity of the law,

The People v. Toynbee.

although there may be a class of cases to which it might properly apply, the provision is wholly void. The law, therefore, must be revised and the proper discrimination made, before it can be enforced.

I shall notice but a single additional point arising upon that portion of the law, which is designed to enforce its penalties.

Section 17 contains important provisions which are made applicable to every prosecution under the act; and if the law is to be revised, it is undoubtedly desirable that the views of this court upon that section should be known. The question arising upon it is in my view of greater importance than any other which the law presents; as it goes to test the value of those clauses of the constitution, upon which our rights of personal security rest.

The second branch of the section provides that upon the trial of every complaint under the act for an unlawful sale of liquor, the defendant shall not be permitted to justify under the second section, (the only way in which it is possible to justify,) unless he shall: 1. Admit the sale, which, by the previous clause, is converted into *prima facie* evidence of guilt: 2. Swear to his innocence, *i. e.* his belief as to the use which the purchaser intended to make of the liquor: and 3. State the reasons upon which his belief was founded.

Can this provision be reconciled with that clause in section six article one of the constitution, which provides that "in any trial in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel," taken in connection with the provision in the same section that no persons shall "be deprived of life, liberty or property" without due process of law?" Of what value is this right "to appear and defend" if the legislature can clog it with conditions and restrictions, which substantially nullify the right? The constitution says, every man shall have a right "to defend." The legislature says you may defend, *provided* you first admit yourself *prima facie* guilty. Can these provisions be reconciled?

In *Greene v. Briggs*, (1 *Curtis R.* 311,) Curtis, J., speaking of the provisions of the constitution of Rhode Island that no

The People v. Toynboe.

person shall "be deprived of life, liberty or property, unless by the judgment of his peers, or the law of the land," says: "The exposition of these words, as they stand in Magna Charta, as well as in the American constitutions, has been that they require 'due process of law,' and in this is necessarily implied and included the right *to answer and contest the charge*, and the consequent right to be discharged from it unless it is proved."

He subsequently adds: "It follows that a law which should preclude the accused from answering to and contesting the charge, *unless he should first give security* in the sum of two hundred dollars, with two sufficient sureties, to pay all fines and costs, and which should condemn him to fine and forfeiture unheard, if he failed to comply with this requisition, would deprive him of his liberty or property, not by the law of the land, but by an arbitrary and unconstitutional exertion of the legislative power."

The conditions imposed upon the right of defence by section seventeen of our act are far more onerous and embarrassing, than that condemned by the learned justice in this passage, and if he is right, it is impossible to sustain the section against this objection.

It is equally clear that it conflicts with another clause of the constitution. Section six, article one, declares that no person "shall be compelled to be a witness against himself." Section seventeen says to the defendant, you shall not go into your defence unless you will not only swear to your innocence, but make yourself a witness and testify to all the circumstances of the case. This, for all substantial purposes, is compelling him to be a witness against himself. It is doing precisely that against which the object of the constitution was to protect him, viz: searching his conscience under *the constraint of an oath*. There is no difference between compelling a man to be sworn, and assuming his guilt if he refuses; because his refusal has precisely the same effect as if he was sworn and testified to his own guilt; *it convicts him*. Indeed, the provision

The People v. Toynbee.

is virtually compulsory, as there could scarcely be a more effectual way of compelling a man to be sworn than to say that, unless you consent you shall be convicted and punished as a criminal. The section, therefore, is in this respect, in my judgment, a plain violation of the constitution.

But a point of still greater interest arises upon the first branch of section seventeen, which provides that "upon the trial of any complaint commenced under any provision of this act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of sale."

There are two classes of cases upon which this provision operates with great severity. Although the act does not prohibit the keeping of spirituous liquor or the giving it away, in a private dwelling, yet by this clause, the mere delivery is made *prima facie* evidence of an unlawful sale, *without exception as to place*. No one, therefore, can in his own house, give a glass of wine to a friend without thereby affording *prima facie* evidence to convict him of misdemeanor. Other portions of the act purport to respect the sanctity of the private domicile of the citizen; but its innermost recesses are penetrated by this provision, and acts of mere kindness or courtesy are converted into proof of guilt.

But the operation of the section upon another class is equally onerous. I mean the class of licensed venders. Sections two and three expressly authorize certain persons to sell, who are required to give ample security not to violate any provision of the act, and yet, by force of the clause in question, every sale *they* make affords *prima facie* evidence to convict them. The act presumes against the innocence of its own selected agent, and will not permit this presumption to be rebutted, until such agent consents to make himself a witness in the case.

This provision raises the vital question as to the value of that clause in the constitution which secures to every man charged with crime a trial by "due process of law." The

The People v. Toynbee.

most important guaranties of individual right which our constitution affords, are concentrated in this single phrase. As we have already seen, the expression "due process of law" first appeared in a statute of Edward III, as a paraphrase of the words "by law of the land" *per legem terræ* in Magna Charta; and from that day to this, both forms of expression have been held to refer to the *common law*, as distinguished from statutory enactment.

Sir Matthew Hale says: "The common law is sometimes called, by way of eminence, *lex terræ*, as in the statute of Magna Charta, chap. 29, where certainly the common law is principally intended by those words, *aut per legem terræ*, as appears by the exposition thereof in several subsequent statutes, and particularly in the statute of 28 Edward III, chap. 3, which is but an exposition and explanation of that statute." (1 *Hale's Hist. Com. Law*, 128.)

Lord Coke also in his commentary upon Magna Charta, puts the same construction upon the words. (2 *Inst.* 45, 50.)

The courts in this country have held the same. Chief Justice Ruffin, speaking of this clause in the constitution of North Carolina, in the case of *Hoke v. Henderson*, (4 *Dev.* 1,) says that "such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial, before the judicial tribunals, and a decision upon the matter of right, as determined by the laws, under which it vested, *according to the course, mode and usages of the common law*, as derived from our forefathers, are not effectually laws of the land for these purposes."

To the same effect is the language of Judge Bronson in *Taylor v. Porter*, (4 *Hill*, 140,) where, in speaking of section one, article seven of the constitution of 1821, he says: "The meaning of the section then seems to be, that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had *according to the course of the common law*."

If this interpretation is correct, and it is sustained as well

The People v. Toynbee.

by history as by judicial authority, the clause in question was intended to secure to every citizen, the benefit of those rules of the common law, by which judicial trials are regulated; and to place them beyond the reach of legislative subversion. They are indeed virtually incorporated into the constitution itself, and made thereby a part of the paramount law. Trials, therefore, at least such as are criminal, are to be regulated and conducted in their essential features, not by statutes, but by the common law. This the constitution guarantees. Precisely how far the legislature may go, in changing the modes and forms of judicial proceeding, I shall not attempt to define, but I have no hesitation in saying that they can not subvert that fundamental rule of justice, which holds, that every man shall be presumed innocent until he is proved guilty. This rule will be found specifically incorporated into many of our state constitutions, and is one of those rules which in our constitution are compressed into the brief, but significant phrase, "due process of law."

Can section seventeen be reconciled with this rule? It provides, that upon every prosecution under the act, proof of a sale of liquor shall sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of a sale. It is plain, that at common law, the legal presumption would be directly the reverse of that declared by the act. Where the common law would presume innocence, this act presumes guilt. Either the guaranty of a judicial trial according to the course of the *common law* is a nullity, or this provision is void.

But I am prepared to go further, and to hold, that *all* those fundamental rules of evidence, which in England and in this country, have been generally deemed essential to the due administration of justice, and which have been acted upon and enforced by every court of common law for centuries, are placed by the constitution beyond the reach of legislation. They are but the rules which reason applies to the investigation of truth, and are of course in their nature unchangeable. If it does not follow, that, to determine what they are, as applica-

The People v. Toynbee.

ble to judicial proceedings, is a judicial and not a legislative power, still they must necessarily be included in the phrase "due process of law." If this be not the true interpretation of the constitution, if the legislature in addition to declaring what *acts* and what *intentions* shall be criminal, can also dictate to courts and juries the *evidence*, and change the legal presumptions upon which they shall convict or acquit, there is no barrier to legislative despotisms, and the separation of the legislative and judicial departments of the government, the guaranty of trial by jury, and of a trial according to the course of common law, have all failed to afford any substantial security to individual rights.

I am unable, therefore, to resist the conviction that in both branches of section seventeen the legislature has transcended the just limits of its power, and trenched upon the constitutional province of the judiciary.

The judgment of the Supreme Court should be affirmed.

A. S. JOHNSON, J.—The defendant was arrested by a policeman of the city of Brooklyn and carried before a police justice of that city, and was there charged with having sold and kept for sale, and having in his possession with an intent to sell, intoxicating liquor, viz: brandy and champagne. The complaint was made in writing and on oath, and stated in addition to the matters already mentioned, that the complainant saw Toynbee actually engaged in selling intoxicating liquor, to wit: brandy, in violation of the act for the prevention of intemperance, pauperism and crime; that the offence consisted in selling one glass of brandy and one bottle of champagne; that the complainant arrested Toynbee and had brought him before the justice to answer the charge; and that at the same time and place he seized the said brandy and champagne and the bottles in which they were contained, and had stored the same in some convenient place to be disposed of according to the act before mentioned. The defendant asked to be discharged, upon the ground that the act was unconstitutional, and upon the further ground that the complaint did not

The People v. Toynbee.

set forth facts enough to show that any offence had been committed by the defendant. His application was denied. He then objected to being tried by a court of Special Sessions, and offered bail for his appearance at the next court having criminal jurisdiction. The justice overruled his objection, refused to take bail and required the defendant to plead. Upon his plea of not guilty, evidence was given showing that he kept a tavern, in the bar room of which he had sold a glass of brandy and a bottle of champagne as mentioned in the complaint, and that the champagne was imported liquor. The court found him guilty of selling and having in his possession with intent to sell intoxicating liquors, as charged in the complaint, adjudged him guilty of a misdemeanor, imposed upon him a fine of \$50 and \$5.87 for costs, and committed him until the fine and costs should be paid, for not exceeding fifty-six days; and further adjudged that the liquor seized was forfeited and that a warrant should be issued for its destruction.

Upon appeal to the Supreme Court, at general term in the second district, the judgment was reversed. From that judgment of reversal an appeal has been taken to this court.

This proceeding was instituted under the provisions of the act for the prevention of intemperance, pauperism and crime. The sections which particularly relate to it are substantially these, omitting such parts as do not bear upon this particular case: "It shall be the duty of every sheriff, under sheriff, deputy sheriff, constable, marshal or policeman, to arrest any person whom he shall see actually engaged in the commission of any offence in violation of the first section of this act, and to seize all liquor kept in violation of said section, at the time and place of the commission of such offence, together with the vessels in which the same is contained, and forthwith to convey such person before any magistrate of the same city or town, to be dealt with according to law, and to store the liquor and vessels so seized in some convenient place, to be disposed of as hereinafter provided. It shall be the duty of every officer by whom any arrest and seizure shall be made, under this section, to make complaint on oath against the person

The People v. Toynbee.

arrested, and to prosecute such complaint to judgment and execution." (*Laws of 1855, p. 340, &c. § 12.*) "All liquors and vessels in which they are contained, which shall have been found and seized in the possession of any person, who shall have been arrested for violating any provision of the first section and not claimed by any other person, shall, upon conviction of such person of such offence, be adjudged forfeited." (*Sec. 13.*) When any liquor seized under any provision of the act shall be adjudged forfeited as provided in any section of the act, it shall be the duty of the magistrate (after the determination is become final,) forthwith to issue a warrant commanding that the liquor be destroyed. The officer to whom the warrant shall be delivered, is to destroy it and make a return of the destruction, and then an execution is to be issued to sell the vessels which contained the liquor. (*Sec. 10.*) Every justice of the peace, police justice, county judge, city judge (certain other officers in New York,) and in all cities where there is a Recorder's Court, the recorder, has power to issue process, to hear and determine charges and punish for all offences under the act and to hold courts of Special Sessions for the trial of such offences. The section proceeds: "such court of Special Sessions shall not be required to take the examination of any person brought before it upon charge of an offence under the act, but shall proceed to trial as soon thereafter as the complainant can be notified." Power to adjourn, for good cause, is given for not exceeding twenty days. At the time of joining issue, and not after, either party may demand trial by jury, in which case the magistrate is to cause a jury to be summoned and empaneled, as in other criminal cases in courts of Special Sessions. (*Sec. 5.*) No person who shall have been convicted of any offence against any provision of the act, or who shall be engaged in the sale, or keeping of intoxicating liquors, contrary to the act, shall be competent to act as a juror upon any trial under any provision of the act. (*Sec. 16.*) Upon the trial of any complaint under the act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale,

The People v. Toynbee.

and proof of delivery shall be *prima facie* evidence of sale. (Sec. 17.) A violation of any provision of the first section, is made a misdemeanor. The guilty party is to forfeit all liquors kept by him in violation of the section and is to be further punished by a fine of \$50, for the first offence; for the second, by a fine of \$100 and thirty days' imprisonment; for the third and every subsequent offence, by a fine not less than \$100, nor more than \$250, and by imprisonment for not less than three, nor more than six months. The defendant is likewise to pay all costs and fees provided in the act, and in default of payment of any such fine, costs and fees, or any part thereof, the defendant is to be committed until the same are paid, "not less than one day per dollar of the amount unpaid." (Sec. 4.) Such is the machinery of legal process by which according to the act, any person who violates the prohibition of the first section is to be brought to punishment, when the proceeding takes the form of a personal prosecution. Other and not less stringent, and extraordinary methods of procedure, are provided when the prosecution is directed against the liquor alone, to procure its destruction. With these, however, we have in this case no cause to occupy ourselves.

The prohibitory clause itself, upon which these proceedings are founded, constitutes the first section. Omitting certain exceptions from the prohibition, which will be afterwards noticed, it provides that intoxicating liquor shall not be sold, or kept for sale, or kept with intent to be sold, by any person in any place whatsoever. That it shall not be given away, nor be kept with intent to be given away in any place whatsoever, except in a dwelling house, in no part of which any tavern, store, grocery, shop, boarding house or victualing house, or room for gambling, dancing, or other public amusement or recreation of any kind is kept, that it shall not be kept or deposited in any place whatsoever, except in such a dwelling house as is above described, or for sacramental purposes in a church or place of worship; or in a place where either some chemical, or mechanical or medicinal art, requiring the use of liquor, is carried on as a regular branch of business, or while

The People v. Toynbee.

in actual transportation from one place to another, or stored in a warehouse prior to its reaching the place of its destination. By an exception in this same section, liquor may be given away as a medicine by physicians pursuing the practice of medicine as a business, or for sacramental purposes. The section concludes with a provision, that it shall not apply to liquor, the right to sell which in this state is given by any law or treaty of the United States.

By sections 2 and 3, persons answering the description, doing the acts and taking the oaths prescribed therein may be licensed to keep for sale and sell intoxicating liquor and alcohol, for mechanical, chemical or medicinal purposes, and wine for sacramental use.

By section 22, the act is not to be construed to prevent the sale of cider in quantities not less than ten gallons; nor to prevent the manufacturer of alcohol, or of pure wine from grapes grown by him, from keeping or from selling such alcohol or wine nor the importer, of foreign liquor, from keeping or selling the same in the original packages, to any person authorized by the act to sell such liquors; nor to prohibit the manufacture or keeping for sale, nor from selling burning fluids of any kind, perfumery, essences, drugs, varnishes, nor any other article which may be composed in part of alcohol, or other spirituous liquors, if not adapted to use as a beverage, or in evasion of this act.

The foregoing clauses contain, in substance, the prohibition of the act with the exceptions which qualify its effect.

Two other provisions are necessary to be quoted as they bear upon the rights which the owner of liquor has in it and the modes in which he may assert those rights. The first is at the close of section 16, and declares "that no person shall maintain an action to recover the value or possession of any intoxicating liquor sold or kept by him, which shall be purchased, taken, detained, or injured by any other person, unless he shall prove that such liquor was sold according to the provisions of the act, or was lawfully kept and owned by him.

The People v. Toynbee.

The other clause is at the end of section 24, and provides that "all liquor kept in violation of any provision of the act shall be deemed and is thereby declared to be a public nuisance."

The question whether this act is within the authority conferred by the people of this state upon the legislature, or whether it is in conflict with the restraints which the people have in the constitution imposed upon the law making power. is presented by the case before us. It is, perhaps, not absolutely necessary to the decision of the cause, that we should pass upon this question in its broadest aspect. It has not been usual for the courts of the United States to consider questions of constitutional law, when the particular case before them could be disposed of on other grounds. I have no doubt that this practice is grounded upon a wise consideration of the delicate nature of the authority which courts of justice exercise in declaring the acts of the legislative power void as being in conflict with the constitution. The practice, however, rests in the discretion of the judges, and may therefore be departed from when the public interests seem to require that course. It is not unknown to us that much controversy has existed in respect to the constitutionality of this law, and that the whole body of the community is divided in opinion upon it; that these different opinions are maintained with great ardor by those who entertain them, and that very important interests, both public and private, depend upon the solution which the question shall receive at our hands. The question has been presented to the Supreme Court, at different general terms, and conflicting decisions have resulted, so that no private person, nor any public officer, can say what is his duty in the premises. This state of things not only allows us to depart from the ordinary practice, but in my judgment makes it our imperative duty to consider, and finally dispose of the question involved.

In this state all power which is exercised over the people is derived from them, whether it be legislative, executive or judicial; they have conferred it, or it can have no legal existence. To the legislature they have entrusted "the legislative power

The People v. Tynbee.

of this state," as the words of their grant declare, (*Const., art. 3, § 1.*) In the same instrument they have imposed upon all the agents to whom they have committed the powers of the government certain restrictions, which by the intrinsic and original power of the people limit the exercise of authority. Some of these restrictions are in terms imposed upon the legislative power; others equally restrictive upon legislative and executive authority, are expressed in the form of declarations of rights belonging to the people.

In my judgment, legislative power is subject to no other control. In every organized society there must exist somewhere an ultimate power of determining what the interest of the people require, which power having been exercised, its decision is subject to no review, save by the whole body of the society. Upon no part of human action does the law operate more directly, or more legitimately than in respect to actions which are regarded as hostile to the public welfare. In respect to such actions, where no constitutional limit is imposed upon legislative power, legislation is supreme. The right to make such laws lies at the very foundation of society and is intrusted, and ought to be intrusted, as I think, to the law making power. The determination as to what actions shall be forbidden, necessarily involves discretion, to be exercised in view of all the circumstances which at the time are operating upon the welfare of the people. Of such questions the legislature which exercises the power of the people, which is in immediate communication with them, which knows both their desires and their needs, is the ultimate judge. I am speaking solely of the question of power. I am not to judge of the wisdom of the laws under review, or of their reasonableness or abstract justice. Sitting in the exercise of mere judicial power, which is strictly limited to answering the question, what is the law, and has not been entrusted with saying what it ought to be, I have no authority to weigh the justice of legislation and to allow or disallow it as I shall find the scale to turn. Certainly that which the interest and welfare of the people required to be made law, was proper to be enacted, and was within the scope

The People v. Toynbee.

of legislative power if no constitutional inhibition exists. If a court is to judge of such a question at all, it must go over the same field upon which the legislature has acted. It must consider the occasion of the law, the existence of the evil, the suitableness of the remedy. "A person exercising a judicial capacity, is neither to apply to original justice, nor to a discretionary application of it. He goes to justice and discretion only at second hand, through the medium of some superiors. He is to work neither upon his opinion of the one, nor of the other, but upon a fixed rule, of which he has not the making, but singly and solely the application to the case." Whether a given action shall be prohibited, and under what penalty, whether loss of life, or liberty or of fine, must depend upon an infinite variety of facts, and upon the consideration of the evil the action occasions or is likely to occasion to the people. What machinery has a court of justice sitting to determine questions of law, with which to investigate such a question? Upon this subject I can add nothing to the strength and clearness with which, that which I regard as the true legal view of the powers and duties of judges, is stated by Senator Verplanck in *Cochran v. Van Surley*, (20 Wend. 381.) "It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power, by judicial interposition, except so far as the express words of a written constitution give that authority. There are indeed many dicta, and some great authorities, holding that acts contrary to the first principles of right, are void. The principle is unquestionably sound, as the governing rule of a legislature in relation to its own acts, or even those of a preceding legislature. It affords a safe rule of construction for courts in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal and unjust operation of its statutes. Such a construction ought never to be given to legislative language, if it be susceptible of any other more conformable to justice; but if the words be positive and without ambiguity, I can find no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provi-

The People v. Toynbee.

sions, limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law, settled by the deliberate wisdom of the nation, that I can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment."

From a pretty early period the evils of drunkenness have attracted legislative attention. Frequent instances of legislation on the subject are to be found among the English and our colonial laws. With these examples and with the constant practice of our own government in restraining sales of liquor in small quantities, except by license, I feel it difficult to understand how it can be maintained that the use of intoxicating liquors is not a subject upon which legislation can constitutionally take place, to prevent injuries to the health and morals of the people; and if it is a proper subject of legislation at all, I do not know where is to be found (unless in the constitution) any fixed rule by which a court can undertake to say that the absolute use of liquors as a beverage, would be beyond the authority of the legislature. Nor do I find in the constitution any thing which can be applied to restrain the passage or affect the validity of such a law. Certainly the declaration that "no person shall be deprived of life, liberty or property, without due process of law," nor that other, "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers," would have no application to such a law. The right to drink liquor stands upon no higher ground than the right to do many other things which the legislature finds contrary to the public welfare, and can scarcely be secured under those general words, unless upon grounds that would completely tie the hands of the legislature from nearly all interference with the conduct of men. But the legislature have not seen fit to put their legislation into this form. They have not directly prohibited the use of liquors as a beverage, but have attempted to bring about the result which they had in view by forbidding substantially the traffic in liquors, except for other purposes than drinking. This prohibition, if enforced,

The People v. Toynbee.

would have a clear tendency to prevent the use of liquor as a drink, because it would render the procurement of it for any such purpose nearly impossible, unless the seller should violate the law. Indeed, the only ways in which liquors could be procured by any person, without an infraction of the law by some one, upon the construction put by the prosecution upon the terms of the act, would be either to manufacture them, or, perhaps, to buy from an importer in the original packages of importation. If the law in question went no further than to impose such a prohibition upon sales, operating alike upon all the inhabitants of the state, I should find it difficult to say that it, by its own mere force, deprived any person of his liberty or property, within the meaning of the constitution. Such a law would clearly diminish the value of the property, nay almost deprive it of value and render it nearly useless, within this state for the purposes of traffic, for which it was mostly acquired, but it would not touch the thing, nor would it destroy the property, considering that term in its legal sense as descriptive of those rights which men acquire to and over things, and which constitute the legal notion of property.

It is quite obvious that the end which the legislature had in view, assuming that to have been the prevention of the evils of drinking, may be attained by direct and also by indirect measures. For instance, prohibiting intoxication would be one means. Prohibiting drinking at all would be another, one degree more remote. Prohibiting the sale for drinking, is still more remote. So legislation may be carried on farther and farther from the object directly in view, as by prohibiting the sale for any purpose, prohibiting the manufacture, prohibiting even the existence of liquor, or even of those things from which liquor can be produced. Now, though the general purpose is entirely legitimate and within the scope of legislative authority, and though direct legislation for the attainment of that end might be free from objection, yet it by no means follows that measures operating remotely, though conducive to the end in view, may not violate the restraints of the constitution. The purpose, origin and history of declaratory bills of rights, are

The People v. Toynbee.

admirably stated by Chancellor Kent in his commentaries. (§ 1, 2 *Kent Com.* 1.) After stating that the absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property, he says: "These rights have been justly considered, and frequently declared by the people of this country, to be natural, inherent and inalienable." After showing how early and how strenuously they were asserted by our colonial ancestors, he says, that "upon the formation of the several state constitutions, after the colonies had become independent states, it was in most instances thought proper to collect, digest and declare in a precise and definite manner, and in the shape of abstract propositions and elementary maxims, the most essential articles appertaining to civil liberty and the natural rights of mankind." (p. 7.)

"But the necessity, in our representative republics of these declaratory codes, has been frequently questioned, inasmuch as the government in all its parts, is the creation of the people, and every department of it is filled by their agents duly chosen or appointed according to their will, and made responsible for maladministration. It may be observed on the one hand that no gross violation of those absolute private rights which are clearly understood, and settled by the common reason of mankind, is to be apprehended in the ordinary course of public affairs; and as to extraordinary instances of faction and turbulence, and the corruption and violence which they necessarily engender, no parchment checks can be relied on as affording, under such circumstances, any effectual protection to public liberty. When the spirit of liberty has fled, and truth and justice are disregarded, private rights can be easily sacrificed under the forms of law. On the other hand, there is weight due to the consideration, that a bill of rights is of real efficacy in controlling the excesses of party spirit. It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist attempts to disturb private right. It requires more than ordinary hardiness and audacity

The People v. Toynbee.

of character, to trample down principles, which our ancestors cultivated with reverence, which we imbibed in our early education, which recommend themselves to the judgment of the world by their truth and simplicity and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of rights are part of the muniments of freemen, showing their title to protection. (2 *Kent Com.* 8.)

The clauses of the bill of rights before cited, together with the provisions in respect to jury trials, contain the substance of the provisions of chapter twenty-nine of Magna Charta. These clauses have always received a large and liberal interpretation in favor of private rights and against power.

The expression, "by the law of the land," is interpreted by Lord Coke to mean, "by the due course and process of law;" (2 *Inst.*, 46,) and this last expression is afterwards expounded to mean by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original at the common law. (2 *Ins.* 50.) In *Taylor v. Porter*, (4 *Hill*, 140) and in *Embury v. Connor*, (3 *Comst.* 511,) the meaning of these words was considered, by Bronson, J., in the Supreme Court and by Jewett, J. in this court, and they agree in the opinion that at the least "due process of law" imports a judicial trial, and not a mere declaration of legislative will, by the passing of a law. They agreed further in holding as both those courts held, that though private property could be taken for public use upon just compensation, yet for uses not public it could not be taken at all — neither by an act of legislation, nor in any other manner; or as Judge Bronson expressed himself, speaking with reference to that case of *Taylor v. Porter*, which presented the question of the constitutionality of taking a man's land to make a private road, "when one man wants the property of another, I mean to say that the legislature can not aid him in making the acquisition." The same doctrine, in substance, as to the authority of the legislature was affirmed in this court in *Powers v. Bergen*, (2 *Seld.* 358,) where the question arose upon an act of the legislature authorizing a sale

The People v. Toynbee

of lands by trustees not authorized by the will creating the trust. No necessity for the act of the legislature appeared either in the statute or aside from it, either on account of the infancy or other incapacity of the persons living who had vested or contingent interests in the estate, and the court held that the act was not within the powers delegated to the legislature, and that the sale in pursuance of it conferred no title. In that case Judge Jewett, who gave the opinion of the court, cites with approbation the language of Judge Story, in *Wilkinson v. Leland*, (2 *Peters*, 657,) who says: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention." The same construction was again given to these words "due process of law," by Denio and Edwards, JJ., giving the opinion of this court in *Westervelt v. Gregg*, (2 *Kern*. 202). I do not refer to these cases as deciding that now before us, but only to show that without judicial investigation, without "due process of law," no act of legislation can deprive a man of his property, and that in civil cases an act of the legislature alone is wholly inoperative to take from a man his property.

An admirable statement of the constitutional doctrine as to the power of the legislature, both in the punishment and in the creation of offences, is contained in the opinion of Chancellor Sanford in *Barker v. The People*, (3 *Cowen*, 686). "The power of the legislature in the punishment of crimes, is not a special grant, or a limited authority to do any particular thing, or to act in any particular manner. It is a part of 'the legislative power of this state' mentioned in the first sentence of

The People. v. Toynbee.

the constitution. It is the sovereign power of a state to maintain social order, by laws for the due punishment of crimes. It is a power to take life and liberty and all the rights of both, when the sacrifice is necessary to the peace, order and safety of the community. This general authority is vested in the legislature and as it is one of the most ample of their powers its due exercise is among the highest of their duties. When an offender is imprisoned, he is deprived of the exercise of most of the rights of a citizen; and when he suffers death, all his rights are extinguished. The legislature have power to prescribe imprisonment or death as the punishment of any offence. The rights of a citizen are thus subject to the power of the state in the punishment of crimes; and the restrictions of the constitution upon this, as upon all the general powers of government, are, 'that no citizen shall be deprived of his rights, unless by the law of the land or the judgment of his peers, and that no person shall be deprived of life, liberty or property without due process of law.'" "The power of the state over crimes is thus committed to the legislature without a definition of any crime, without a description of any punishment to be adopted, or to be rejected, and without any direction to the legislature concerning punishments. It is then a power to produce the end by adequate means; a power to establish a criminal code with competent sanctions; a power to define crimes and prescribe punishments by laws, in the discretion of the legislature. But though no crime is defined in the constitution and no species of punishment is specially forbidden to the legislature, yet there are numerous regulations of the constitution, which must operate as restrictions upon this general power. The whole constitution must be supported, and all its powers and rules must be reconciled into concord. A law which should declare it a crime to exercise any fundamental right of the constitution, as the right of suffrage, or the free exercise of religious worship, would infringe an express rule of the system, and would therefore not be within the general power over crimes. Particular punishments would also encroach upon rules and rights established by the constitution.

Though the legislature have an undoubted power to prescribe capital punishment and other punishments which produce a disability to enjoy constitutional rights, yet a mere deprivation of rights would, even as a punishment, be in many cases repugnant to rules and rights expressly established. Many rights are plainly expressed and intended to be fundamental and inviolable in all circumstances. A law enacting that a criminal should, as a punishment for his offence, forfeit the right of trial by jury, would contravene the constitution; and a deprivation of this right could not be allowed in the form of a punishment. Any other right thus secured as universal and inviolable, must equally prevail against the general power of the legislature to select and prescribe punishments. These rights are secured to all: to criminals as well as to others; and a punishment consisting solely in the deprivation of such a right would be an evident infringement of the constitution, and all punishments which do not subvert such rules and rights of the constitution are within the scope and choice of the legislative power."

The legislature then has power to create offences, and to declare in what cases the consequences of loss of life, of liberty and of property shall be attached to the commission of offences, they being ascertained by "due process of law" to have been committed. But the form of this declaration of right "no person shall be deprived of life, liberty or property, without due process of law," necessarily imports, that the legislature can not make the mere existence of the rights secured, the occasion of depriving a person of any of them, even by the forms which belong to "due process of law." For if it does not necessarily import this, then the legislative power is absolute.

To provide for a trial to ascertain whether a man is in the enjoyment of either of these rights, and then as a consequence of finding that he is in the enjoyment of it, to deprive him of it, is doing indirectly just what is forbidden to be done directly, and reduces the constitutional provision to a nullity. For instance, a law that any man who, after the age of fifty years, shall continue to live, shall be punished by imprisonment or

The People v. Toynbee.

fine, would be beyond the power of the legislature. It would be so upon the ground that he can not be deprived of life, liberty or property, without due process of law, and that the right to live and not be punished for living, was put by the declaration of right beyond the power of legislative interference. Upon the same principle a law which should make it a crime for men either to live in, or rent, or sell their houses, would fall within the same prohibition upon legislative authority. There may, then, in respect to offences attempted to be created by legislation, a question arise capable of being considered by courts of justice, whether the thing forbidden is an essential part of either of those secured private rights, so essential that without it the right can not exist at all. Such a question is undoubtedly of the most delicate nature, as well looking to the wide authority of legislation as to the intrinsic difficulty of distinguishing between the exercise of the clearly existing power to regulate the manner of enjoying these rights, and the exercise of an absolute and prohibited power directly to infringe upon them. A court of justice may well hesitate before such a question, and yet is bound to meet it when presented. A similar case of difficulty has arisen in the courts of the United States in respect to the acknowledged power of the states to regulate remedies for the enforcement of contracts, and the power prohibited to them by the constitution of the United States, of impairing by law the obligation of contracts. There the remedy and the obligation so run into each other, that to draw a line between them seems almost impossible, yet the duty has been performed, and it has been held that, though the remedy may be altered by the state legislatures, yet that a substantial and reasonable mode of enforcement in the ordinary and regular course of justice, must be given to the party injured by the breach of the contract. The cases are stated and examined in *Morse v. Gould*, (1 Kernan 281). The rule is necessarily indefinite, for the conflicting rules so blend together in practice, that no other than an indefinite rule is possible. The same sort of question is presented in respect to the infringement by legislation of men's private rights, and the regu-

The People v. Toynbee.

lation of them, and their enjoyment. The substantial right can not be destroyed; its enjoyment is not an offence, and legislation can not make it an offence. At the same time the mode of enjoyment in its broadest sense, is subject to legislation, though it be affected very injuriously, provided a substantial right is left. Now, in respect to liquors, no lawyer can doubt that on the third of July they were property, in which the owner had the same right as in any other article of personal property; nor that since that time they remain property, and that as such they come under the protection which the constitution affords to property. The power of disposition or use in some way, or at least the right to keep and preserve, enters into every notion of legal property. To destroy the power of sale alone, does not indeed physically destroy the property, though it takes from it that quality which gives it its chief value, and for which its possession is mainly desirable. Still I am not prepared to say that the legislature may not under the constitution, take away the right of sale to the extent which this act contemplates. But by a general prohibition of sale, irrespective of quantity, and person and purpose, coupled with a prohibition, even to keep it, except in a dwelling house, where no store, &c., is kept, and in places where certain arts and trades are carried on, the legal existence which the law and the constitution designate as property is in my judgment broken up, and the private injury is as completely effected as if the thing itself were physically taken away.

The constitution does not make it a condition on which its protection is extended to property that its owner shall also own a dwelling house. They who owned liquor on the 3d of July, and who did not own, or could not procure the use of a dwelling house or other excepted place, were, without any act done on their part, made guilty of a misdemeanor, punishable by fine and forfeiture, unless they destroyed that which, by the same law, was recognized as property. Allowing it to remain where it happened to be was constituted an offence, and there was no way of escape, except by destroying the property, for the power to sell, even to persons licensed to sell again, was

The People v. Toynebee.

taken away. That it may appear that this is no overstatement of the case, I will shortly restate the provisions of the law. With the trifling exceptions before stated, liquors are forbidden to be sold or kept with intent to be sold, or to be given away or kept with intent to be given away, except in a dwelling where no tavern, store or place of amusement is kept; or to be kept or deposited any where save in such a dwelling house, or in a church for sacramental purposes, or in some place where a chemical, mechanical or medicinal art is carried on as a business, or while in actual transportation from one place to another, or stored in a warehouse prior to reaching their place of destination. In addition to these prohibitions which together constitute a single scheme for dealing by law with this species of property, liquor kept contrary to them is declared to be a nuisance, and for an injury to it, or the taking it away from the owner, he can maintain no action, unless he proves that it was "lawfully kept and owned by him;" and as this lawfulness is made to depend, among other things, in all cases upon the non-existence of an intent to sell, and in some cases upon the non-existence of an intent to give it away, the nearly impossible burthen of making out these negatives is thrown upon the owners. This scheme taken together, in my judgment, is a scheme not of regulation, but of legal destruction of property, which, as much as any other, was under the protection of the constitution. It does not in its effect come short of a law authorizing any officer, or any one, directly, to destroy the liquor. Between directly authorizing the destruction, and telling the owner that he shall be fined, and his property destroyed, also, if he does not anticipate the action of the law and destroy it himself, I can not distinguish. If such a law as to liquors can stand, the same provisions may be made as to any other property; and if such be the power of the legislature, those words "no person shall be deprived of life, liberty or property, without due process of law," are no longer deserving of a place "among the muniments of freemen, as showing their title to protection."

There is no doubt a seeming anomaly in the result to which

I have come, that mere rights of property should stand in the way of criminal legislation. The only solution of the difficulty is to be found in the consideration that it may not have occurred to the convention who framed, or to the people who adopted the constitution, that in one and the same legislative act, an article which had always before been regarded as property, might be recognized as useful for some purposes, not dangerous in itself, nor evil, unless used as a drink, capable of sale by some people and the subject of property in the hands of every one who lawfully acquired it, and yet that the public interests might be deemed to require that the lawful owner should neither sell it, irrespective of his intent in selling it, nor keep it, irrespective of his intent in keeping it, unless he could procure a mere dwelling house to keep it in, on pain of fine and imprisonment and forfeiture. Had such a contingency occurred to them, it is altogether probable that they would have provided for it, either by narrowing the protection which the constitution extends to property, equally with life and liberty, if they deemed that expedient, or possibly by providing expressly for such legislation.

The prohibitions of the first section taken together, and they form but a single scheme, and are to be enforced by the same penalties, can not therefore, in my judgment, be upheld, at least in respect to property which had been acquired while there was no prohibition against the acquisition of such property. The future acquisition the legislature might, in my opinion, control, and I am not disposed to deny that they could have subjected such future acquisitions to the prohibitions this act imposes. But in this act they have made no discrimination. The provisions extend and were clearly meant to extend to all liquors. It is no part of the proof to make out the offence according to the statute to show that the liquors were acquired after the prohibitions became operative, nor is the fact that they were acquired before, any defence under the statute. The only way of defending against it, on the ground in question, is by asking to have it declared void. Laws in relation to civil rights are

The People v. Toynbee.

sometimes held to be unconstitutional in so far as they affect the rights of certain persons, and valid in respect to others. This is done mainly upon the ground that the courts will not construe them to relate to such cases as the legislature had not power to act upon. To statutes creating criminal offences, such a rule of construction ought not to be applied, and I can not find any trace of its ever having been applied. It is of the highest importance in the administration of criminal justice, that acts creating crimes should be certain in their terms and plain in their application, and it would be in no small degree unseemly that courts should be called upon in administering the criminal law, to adjudge an act creating offences at one time valid and at another time void. It must, I think, stand as it has been enacted, or not stand at all. In my judgment, therefore, the first section of the act in question, with the penal clauses founded upon it, ought to be declared void.

The next question is as to the process of trial, condemnation, forfeiture and punishment, which the act introduces. I doubt much whether the clause of the bill of rights that no person shall be deprived of life, liberty or property without due process of law, necessarily imports a jury trial as part of all due process. If it does, then, unless all civil proceedings are out of the purview of the provision, and they were not thought to be in *Taylor v. Porter*, (4 Hill, 140,) and *Embury v. Conner*, (3 Coms. 511,) it seems difficult to say on what grounds equity proceedings, by which men are often deprived of property, can be sustained where no jury exists. The right to jury trial is secured by other sections of the bill of rights. If this portion gives it in all cases, then the others can hardly stand with it. For on looking at them, it is apparent that jury trials were intended to be continued where they had existed, and that cases were in contemplation in which jury trials did not and would not exist. I incline to the construction which Chancellor Kent gives in his commentaries, that "the better and larger definition of due process of law is, that it means law in its regular administration through courts of justice. (2 Kent. 13.) But it is not necessary, in my opinion, to pronounce upon this ques-

The People v. Toynbee.

tion, because the first part of article 1, section 2, "the trial by jury in all cases in which it has heretofore been used shall remain inviolate forever," is broad enough and efficacious enough to secure it. The expression, "in all cases in which it has heretofore been used," is generic. It does not limit the right to the mere instances in which it had been used, but extends it to such new and like cases as might afterwards arise. For instance, felonies, were triable only by jury. I do not doubt that all new felonies must be tried in that way, and that by force of this section; for section 6, which provides that no one shall be held to answer for a capital or otherwise infamous crime, except on indictment or presentment of a grand jury, does not, in terms, require a jury trial of the issue on the indictment. The other section does require it, as well in new felonies as in old, because they belong to the class of cases in which at the adoption of the constitution such a trial was used. Applying the principle to this case, we find that from 1830, at least, misdemeanors by violation of the excise laws were not triable in courts of Special Sessions at all (1 R. S. 682, § 25; 2 R. S. 711, § 1,) but in courts of General Sessions or of Oyer and Terminer, which were courts proceeding according to the course of common law. And moreover, even in cases of offences where the Special Sessions had jurisdiction, the defendant might always by giving bail, at least after 1830, secure to himself a right to trial by jury in the other courts. It does not at all affect this argument to say at an earlier period jury trial was not a right in such cases. The course of the law is to enlarge private right, not to restrict it. When jury trial was given for the first time in such cases, it was bestowed because the legislature desired to extend its protecting influences, and when afterwards the new constitution was adopted, jury trial in cases where it was then accustomed, received the sanction and protection of the organic law. Writings are to be construed as of the time when they are made; and "heretofore" in this clause, means before 1846, and can not, to limit its meaning, be carried back to 1777, and confined to the cases, which at that earlier period were triable by jury.

The People v. Toynbee.

This act provides that offences presented personally against the offender and for which he is punishable by fine, by forfeiture and sometimes by imprisonment, shall be tried by any one of the numerous inferior magistrates, either without a jury at all, or by a jury of six men, with very peculiar qualifications. (*L. 1855, ch. 231, § 16.*) This is not what the constitution means by jury trial. *Cruger v. Hudson R. R. R. 2 Kern. 190.*) That must be within the terms of the constitution a jury of twelve men. The act is entirely inconsistent with the idea that the magistrate is to let the defendant to bail to answer at another criminal court. Its direction is that he is not to take the examination of the defendant, but is to proceed immediately to a trial, and he is to give judgment, and from his judgment an appeal lies. He can, according to the act, proceed only for the purpose of determining upon the guilt or innocence of the accused; and constitutionally this power could not be conferred upon him, the whole provision, which was made only with a view to this kind of trial and not for the purpose of holding the offender to answer elsewhere, must fall.

It follows that the act conferred no jurisdiction upon the magistrate to try the defendant, and that the judgment of the Supreme Court reversing that of the justice, must be affirmed.

HUBBARD, J.—The complainant, John Mathews, a police officer of the city of Brooklyn, arrested the defendant under the 12th section of the act entitled “An act for the prevention of intemperance, pauperism and crime,” passed April 9, 1855, for selling in his premises a glass of brandy and a bottle of champagne wine, and seized the said liquors, together with the vessels in which they were contained. The defendant was taken before a police justice of that city by the officer, and there charged by him in substance with keeping for sale and having in his possession, with intent to sell, intoxicating liquors, and with selling one glass of brandy and one bottle of champagne, contrary to the provisions of the said act. The defendant then offered to give the usual bail for his appearance before the next

The People v. Toynbee.

court having criminal cognizance. The justice refused to receive the bail, and the defendant pleaded not guilty. It was then proved that the defendant kept a hotel in the said city of Brooklyn, and that on the 17th day of July last he sold one glass of brandy and one bottle of champagne wine, and at the wine was imported liquor. The defendant was found guilty of the offence charged in the complaint, and was adjudged to pay a fine of \$50 and costs. It was further adjudged that the liquors so seized by the officer and described in the complaint be forfeited, and that a warrant issue for their destruction. The defendant appealed to the Supreme Court in the second judicial district, where the judgment was reversed. The people then appealed to this court.

The first ground assumed by the appellant's counsel on the argument, was that the sale of imported liquors in a less quantity than the package of importation, was contrary to the provisions of the act under which the defendant was convicted. This is clearly a tenable position. In the view which I take of the law in this case, it is not very essential that it be considered at much length. But as the point has been fully argued and presents some questions of general interest as it respects the relative jurisdictions of the federal and state governments over imported articles, including liquors, I will consider it in this place.

It is not contended by the defendant's counsel that the exception contained in the first section of the act in question, embraces all imported liquor *in specie* irrespective of its condition, whether in the hands of the importer or third persons. The excepting clause reads as follows: "This section shall not apply to liquor the right to sell which in this state is given by any law or treaty of the United States." In its general character, the act is highly penal, and should be construed strictly. But this rule, intended for the protection of the liberty or property of the citizen, should not be so applied as to narrow the ordinary import of the words used, to the exclusion of cases, a description of property or persons, which, according to common acceptation, would be within them. (5 *Wheat.* 76.) The

The People v. Toynbee.

office of all construction or interpretation of statutes, whether penal or remedial in the application of its maxims, is to ascertain the mind or intention of the law makers. (1 *Seld.* 562; 2 *id.* 9.) Effect should be given, if possible, to every word used, and if doubt exist as to the real intention of the legislature, reference to dispel the ambiguity should be had to the body of the statute, its great object and policy. It is also a cardinal maxim of interpretation to so construe the words of a statute, if possible, as to uphold rather than defeat it; if susceptible of two hostile constructions, to give it that which will sustain and effectuate its object.

In the light of these maxims, it can not be difficult to ascertain the design of the legislature in the exception referred to. The language or phraseology is not the most perspicuous, still the intention is quite apparent. The construction contended for by the defendant's counsel, would make the clause read as though it contained simply the words, "this section shall not apply to imported liquor." Had the legislature intended this broad exception, it is but reasonable to suppose they would have used this simple mode of expression, thus avoiding all speculation as to intention. The mode of expression adopted, evinces clearly that a qualification was intended to be annexed. Considering the whole clause, in connection with the well settled *right* of the importer of liquor, I have no doubt the legislature designed to shield that right of sale in the package of importation, which the importer impliedly has under the laws of congress, and to exempt the liquor *in specie* from the operation of the law, only so far as necessary to protect that right. This construction harmonizes with the policy of the law, which was to cut off completely the traffic within the state, in all liquor as a beverage, whether imported or not. It would be a futile measure indeed, to proscribe the domestic and give entire *immunity* to imported liquor. Such an act would be *felo de se*, would defeat itself, and vastly increase rather than diminish the evils of intemperance. Such folly should not be imputed to the legislature as intended.

In determining the scope of the exception, therefore, it is

The People v. Toynbee.

necessary to ascertain the *nature and extent of the right* of the importer to sell his importation. He has no right, grounded upon any *express* law or treaty; but it has been held that he has an *implied right* growing out of his payment of duties, and that this right can not be directly infringed or taken away by any state law. It was so adjudged in the case of *Brown v. The State of Maryland*, (12 *Wheat.* 419,) and approved in the subsequent license cases, in 5 *How.* 504. These decisions, pronounced by the highest tribunal in the land, whose peculiar province it is, to expound the federal constitution and laws, and to define the boundary between the federal and state sovereignties, establish the law that no state can pass a law for the purpose of *license, taxation* or otherwise, directly affecting an import of foreign merchandise while in the hands of the importer, nor impair his right of sale in the original package of importation. A state law having this direct effect, invades the domain of congress in its regulations of foreign commerce.

But it is urged that if the act in question assumes to prohibit the sale of imported liquors by retail, within the interior of the state, it conflicts with the *revenue laws* of congress. The argument is that the prohibition lessens the value of the article, discourages importation, and thus as a consequence diminishes the *quantum* of revenue. This consequence is admitted, but the argument proves too much; legitimately carried out it would forbid the state from enacting any laws for taxation or otherwise, operating upon property imported of all descriptions, as the result must to some extent affect the quantity of imports. But aside from this the question is perfectly answered by the decisions in the Supreme Court of the United States above cited. (*Thurlow v. The State of Mass.*; *Fletcher v. The State of Rhode Island*; *Pierce v. The State of New Hampshire*, 5 *How.* 504.) Those cases arose under the license laws of the several states. The two first decide the precise question under consideration. They distinctly hold that the power of congress in regulating foreign commerce extends no further into the interior of a state than is essential to render the force effective in the collection of duties; that for this purpose it embraces the

The People v. Toynbee.

article imported while it remains in the hands of the importer, and until he exercises his implied right of sale; that as soon as the article loses its *distinctive character as an import*, is broken up or sold, it then mingles with the general mass of property of the state and becomes a subject of state authority. Here is a well defined boundary between federal and state jurisdictions, as it respects all importations.

The act in question by the exception alluded to, expressly refrains from all interference with the operation of the laws of congress or with the right of sale of the importer as above stated, and hence is not obnoxious to the objection I am considering.

The next question to be considered relates to the prohibitory character of the law, and its vindicatory provisions as it respects existing rights of property in liquor at the time the act took effect. This is purely a question of legislative power, under the fundamental law. It is needless to say that the courts have no concern with the wisdom or expediency of the enactment, to accomplish the beneficent ends indicated by the title. The policy of this government, from its foundation, certainly vindicates the political necessity and economy of stringent laws circumscribing the sale of spirituous liquors.

I entertain no doubt of the constitutional competency of the legislature to prohibit entirely the commerce, within the state, in liquor as a beverage, by laws *prospective in their operation*. If, in the judgment of the legislature, the public welfare required it, the *future production, manufacture or acquisition* of liquor might be prohibited. The sovereign power of the state in all matters pertaining to the public good, the health, good order and morals of the people, is omnipotent. Laws intended to promote the welfare of society, are within legislative discretion, and can not be the just subject of judicial animadversion, except when it is seen that the constitutional guarantees of private property have been invaded. The police power is, of necessity, despotic in its character; individual rights of property, beyond the express constitutional limits, must yield to its exercise. And in emergencies, it may be exercised to the

destruction of property without compensation to the owner, and even without the formality of a legal investigation. It is upon this principle that health and quarantine laws are established, that a building is blown up to arrest a conflagration in a populous town, that the public market is purged of infectious articles; that merchandise on ship board, infested with pestilence, is cast into the deep, and public nuisances are abated. It is the public exigency which demands the summary destruction, upon the maxim that the safety of society is the paramount law. It is the application of the personal right or principle of *self preservation* to the body politic.

I know of no limits to the exercise of the police power vested in the legislature, except the restrictions contained in the written constitution. Under our system of government, with co-ordinate branches, each independent within its sphere, and all deriving their powers from a common source, the fundamental law, one can not exercise a supremacy over the other, except as it finds its warrant for it in that law. The judiciary possesses no legitimate authority over the acts of the legislature, aside from the constitutional grant; and even this authority is exercised in an indirect manner, when its powers are appealed to, to carry a statutory law into effect; and then only as it respects the individual rights of property or of person.

It is said that this idea of the omnipotency of the legislature, within the express constitutional restrictions, is a fallacy. It is conceded that all power emanates from the people, and that the written constitution clothes the legislature with all the power it possesses. But the grant of power in that instrument is general, of all the legislative power of the state; what this is precisely, is not and can not well be defined. Aside from the express limitations, it is believed to embrace all the common law power which the legislature would have possessed had the fundamental law remained, as in England, a part of the unwritten law of the state. This is by no means an alarming proposition. The declaration of rights forming the

The People v. Toynbee.

guaranty of personal liberty and property, in the first article of the constitution, when construed according to its full spirit and intent, is quite ample to protect the citizen against the unauthorized encroachments of the legislature; to protect against all sumptuary laws and laws of kindred character, which have not the public good for their object. I am opposed to the judiciary attempting to set bounds to legislative authority, or declaring a statute invalid upon any fanciful theory of higher law, or first principles of natural right, outside the constitution. If the courts may imply any limitation, there is no bound to implication, except judicial discretion, which must place the courts above the legislature, and also the constitution itself. This is hostile to the theory of the government. The constitution is the only standard for the courts to determine the question of statutory validity.

There is no constitutional restriction upon the power of the legislature in the regulation of the sale or traffic in intoxicating drinks, whether affecting existing rights of property in liquor or not. As a scheme of *regulation*, the degree of the limitation of the sale or traffic is a matter of legislative discretion.

The fault of the present law is, that it does not profess to be a scheme of regulation. There is no attempted discrimination between liquor owned at the time the law took effect, and that acquired afterwards. I have reflected with much attention to see whether the courts could not make the discrimination, for instance, as a question of fact to be ascertained in a given case, but I have encountered the insurmountable difficulty, that the legislature plainly intended that there should be no such distinction. No defence or trial could be admitted on such ground, for the reason that it would be against the manifest policy of the act. It is the intent of the statute alone which the courts are authorized to execute.

The prohibitory feature of the law must therefore be regarded as extending to all liquor in the state, at the time the act took effect. In this aspect, I will in few words give my views of its unconstitutionality as it respects vested rights of property

in liquor under the organic law, which forbid the citizen being deprived of his property without *due process of law*.

That liquor is recognized by the law as property, that the constitution knows no distinction in its guaranties of the rights of property of all kinds, that the constitutionality of the laws is to be tested the same as though it related to some other and perhaps better species of property, is not questioned. The constitution surrounds liquor as property, with the same inviolability as any other species of property. There can be no room, I think, for difference of opinion as to the meaning of the phrase "due process of law," as used in the constitution. It means an ordinary judicial proceeding. In a criminal case, an arraignment, formal complaint, confronting of witnesses, a trial, and regular conviction and judgment. When a forfeiture of property is made a part of the punishment as in this case, the judgment embracing it would in its effect deprive the offender of his property in the constitutional sense. I think it competent for the legislature to declare a forfeiture of liquor which an offender may have in possession, as a mode of punishment; and if the law in question was in other respects constitutional, I should uphold the judgment of forfeiture in this case as entirely proper. But the portion of the law which authorizes the seizure and destruction of liquor where the prosecution or conviction of the owner is not contemplated, I should not hesitate to pronounce void, as property is thus destroyed or the citizen deprived of it without process of law. It is not pretended, nor can it be, that property which is not *per se* a nuisance can be annihilated by the force of a statute alone, or by proceeding *in rem* for the punishment of a personal offence. Liquor is not a nuisance *per se*, nor can it be made so by a simple legislative declaration. It does not stand in the category of common nuisances, which of themselves endanger the welfare or safety of society. It is its use and abuse as a beverage which gives it its offensive character. Otherwise it is entirely inoffensive. In my judgment, therefore, it can not be confiscated to prevent its misuse, except through a prosecution against the owner *in personam*.

The People v. Toynbee.

But it is said that this law does not assume to deprive any one of his property in liquor; that the owner is allowed to retain the unmolested custody and personal use of it, according to his pleasure. It is true, that the owner may not be molested in this enjoyment, provided he keeps it in his dwelling house, if fortunate enough to possess a domicile. I apprehend that by a fair construction of the law, he is forbidden, under a severe penalty, from keeping it elsewhere, except for mechanical and other specified uses, although innocent of any intent to sell. I have examined the first section of the law with care to see if it could not be construed in such manner as to make the keeping in any place, except a dwelling house, criminal only, when accompanied with an intent to sell. But the section can not be so construed. The language is too clear to admit of a doubt as to the intention of the legislature. The keeping or deposit in any place, except in a dwelling house, or place where some trade or business is carried on, requiring its use, is prohibited, and by the fourth section of the act such keeping or deposit is a crime. This certainly is a most extraordinary provision, which must have the effect to render a person a criminal who was so unfortunate as to have a quantity of liquor on hand in a forbidden place at the time the law took effect, although he had no intent to violate the law by selling. A person thus circumstanced would have but one of two methods to avoid criminality, either just before the law took effect to remove the liquor to a dwelling house or to a shop for mechanical and other prescribed uses, or destroy it with his own hand. I can scarcely credit the thought, that the legislature designed the law to have this effect; but no other construction can be put upon the language of the first section of the law, and we are bound to suppose judicially that the legislature intended what their words import.

The law does not even countenance the exportation of the liquor after it took effect. The plain design of the law seems to have been to cut off the *liquor itself*, to ensure its destruction, by circumscribing the keeping of it, and authorizing its seizure if kept in a forbidden place, or with a criminal intent

to sell. The entire right of sale within the state at least, is prohibited, and in this, in my judgment, consists the error of the law, as it respects the liquor owned when the law went into operation. If there had been any right of sale within the state preserved, for instance to a licensed vender, although of minor importance, it would have been sufficient, perhaps, to have impressed the law with a character of regulation, and saved its validity.

But the abolition of all right of sale in the state, is equivalent to, and is, a substantial deprivation of the owner of his property. The right of sale is of the very essence of property in any article of merchandise, its chief characteristic: take away its vendible quality and the article is practically destroyed. As applied to merchandise of any description, this effect can be judicially seen. Even if the law allowed exportation, that would be of such minor importance, as not to save the law from the charge of effectually depriving the owner of his property in the liquor. It is but of trifling value after the entire domestic market is closed against it.

I am unable, therefore, to avoid the conclusion, that the prohibition in the first section of the law is invalid, inasmuch as it makes no discrimination, nor allows the courts to make any, but extends to all liquor irrespective of the term of its acquisition, and that by closing the domestic or state market, it in effect substantially deprives the owner of liquor acquired before the law took effect, of his vested rights of property therein, without due process of law.

At the trial before the police justice the defendant offered bail for his appearance before a higher court having criminal jurisdiction. It was an error for the court to refuse to receive it. I am well satisfied that the defendant had a constitutional right of trial by a common law jury of twelve men, and that to this end, he should have been allowed to give bail to appear before a tribunal where such a jury could be obtained. This right of trial by jury is secured by article 1, section 2 of the constitution, which reads, "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever."

The People v. Toynbee.

The term *cases* is used in a *generic* sense, it embraces grades or classes, not individual or particular cases, except as they make up a class. The intent of the constitution was to preserve the right as amply as it was enjoyed at the time of its adoption. The right of bail existed in all cases of felonies and misdemeanors, and was intended to be preserved, without any distinction as to whether the offence existed at the time the constitution took effect, or was subsequently enacted by statute. There is no ground for any such distinction in principle, as the right is as important in the one case as the other, as the punishment may be the same.

Section six of the same article of the constitution does not assume to limit the operation of section 2. That section simply forbids the legislature from enacting any law by which an offender charged with an infamous crime, in other words a felony, may be held to answer except upon indictment. By implication, it is said, the legislature may prescribe the mode of trial in all cases of misdemeanor. No such implication should be indulged to take away an express grant of the great privilege of trial by a common law jury by another section. It may be that under this implication the legislature may provide for the trial of a misdemeanor before a court of Special Sessions, with or without a jury, subject, nevertheless, to the right of the accused to give bail to secure the advantages of a jury at common law. In this view the two sections are harmonious, and do not in any respect conflict.

It may be said perhaps that the right of such a jury trial in misdemeanors is not an absolute right under the law as existing when the constitution was adopted, that it was conditioned upon giving bail within twenty-four hours after arraignment. This condition, however, does not affect the right itself; it is the misfortune of the accused if his poverty prevents him from availing himself of the condition. The right is perfect, and the constitution secures its exercise upon the condition, which can not be taken away by any legislative act.

I am of the opinion therefore that the judgment of the Supreme Court ought to be affirmed.

The People v. Toynbee.

The conclusion arrived at by Judges SELDEN, A. S. JOHNSON and HUBBARD, was concurred in by Denio, Ch. J. and by Judges Comstock and Mitchell, the latter voting for affirmance on the ground that the defendant had been deprived by the act of his constitutional right of trial by jury.

The following dissenting opinion was delivered by

T. A. JOHNSON, J.—It has been shown, I think, in the case of *Wynehamer v. The People*, decided at this term, and we all agree, that imported liquors, the moment they leave the hands of the importer, have passed the line of foreign commerce and federal authority, and become exclusively subject to state regulations and control. And that when they are once brought into this condition, the only right which attaches, so far as any right flows from government, is derived wholly from state laws and they are not then within the exception of the first section of the act.

I have also attempted in that case, as I think, successfully, to demonstrate that the legislature, being the sole and exclusive law-making power in the state, has, by virtue of its office, from the very nature and constitution of government, the power, and is charged with the duty, of regulating, restricting, controlling, and even prohibiting altogether, any traffic in any property which is found to be demoralizing in its effects upon the community, or injurious to its interests, or burthensome to the government. And that there is not, either in the constitution of the United States or in that of this state, any limitation or restriction upon the exercise of this power, which is, in any respect, in conflict with the provisions of this act, so far as it prohibits the sale of intoxicating liquors.

The right of traffic or the transmission of property, as an absolute, inalienable right, is one which never has existed since governments were instituted, and never can exist under government. The government has always regulated and controlled it to the full extent required, in its judgment, by the public interests and necessities, as the whole history of legislation will clearly show. Government possesses many powers which

The People v. Toynbee.

it does not habitually or frequently exercise, and only puts forth to remedy particular evils or to meet occasional exigencies. But it must necessarily have the same right to prohibit any particular traffic, or branch of traffic, which it finds or deems injurious, and to declare it criminal, that it has to prohibit and declare criminal the injurious conduct and practices of men in other respects. Otherwise, the right to property and its transmission would be held superior to the right to life and liberty.

Our statutes "concerning the acquisition, the enjoyment and transmission of property, real and personal" (1 R. S. 717) "of the regulation of trade in certain cases" (*id.* 528); "of the proof and recording of conveyances of real estate" (*id.* 755); all acts relating to revenue, excise, usury, champerty, lotteries, and the like, with which our statute-books abound, have their sole foundation in this right.

This being so, it follows, inevitably, that the occasion and necessity for the exercise of the power embodied in a statute is wholly a matter of legislative judgment and discretion, where no constitutional restriction intervenes, with which no other power in the government has any right to interfere; at least, after the executive sanction has been given.

If the legislature shall determine that the occasion has arisen, or that the necessity exists, for the exercise of a more extended and stringent power, than it has hitherto exercised, who shall decide to the contrary. What other tribunal is clothed with power to entertain an appeal, and reverse such determination?

The veto power, given to the executive, is the only authority the constitution has provided, and that must be exercised before legislation has ripened into statutes, and is then, not necessarily conclusive.

Whoever bestows the slightest reflection upon the nature and character of the judicial office, will see that courts can entertain no such question. And any attempt on their part to take cognizance of it, and to draw it within their jurisdiction, would be a clear invasion of the legislative province, and a usurpation of legislative power.

The People v. Toynbee.

The spectacle of a conflict, between the representatives of the legislative and the judicial sovereignty, of the people, respecting a question of this character, upon any other than clear, undoubted, constitutional grounds, would, at this day, be at once novel and alarming.

How the judiciary must fare, in such a contest, in such a cause, it is not difficult to foresee. Every legislative act, when questioned, is to be brought to the test of the constitution, and if the power exercised is not there forbidden, in express terms, or by clear and necessary implication, courts have no discretion but are bound to pronounce it valid. The right of courts to declare legislative enactments, in derogation of the constitution, void, is one which has been too long and steadily exercised in this country, to be now doubted or questioned.

It is, however, one of the highest and most delicate of all conservative powers, and is never to be exercised against the acts of the superior branch of the sovereignty, in doubtful and questionable cases. The legislative department, being naturally the superior, its authority is always presumed to have been rightfully exercised. And this presumption is to prevail, until the contrary has been made clearly to appear, and has been determined by the courts.

The only questions which arise in this case, differing from those considered in the case before referred to, relate to the authority and jurisdiction of the court of Special Session before whom the defendant was tried and convicted, and the right of seizure and destruction of the contraband property.

These I propose very briefly to consider. It appears from the case, that when the defendant was arrested and brought before the justice, he objected to being tried by a court of Special Sessions, and offered to give bail to appear at the next court having criminal jurisdiction. The objection was overruled, the right to give bail denied, and the defendant was compelled to go to trial before the Special Sessions. It is claimed that the court erred in refusing to take bail. The court was I think right in refusing to take bail.

The People v. Toynbee.

The act undoubtedly contemplates, and was designed to effect, a speedy trial, and hence the justices and other officers authorized to issue a process under the act, are required imperatively, to hold courts of Special Sessions, to hear and determine charges, and to proceed to trial as soon as the complainant can be notified, unless for good cause shown an adjournment shall be granted.

Hence also the privilege given to persons brought before a magistrate in the cases prescribed in the Revised Statutes of giving bail to appear at another court, and thus avoiding a trial before the Special Sessions, is not given to the persons complained of, for the offences created by this act. Under the Revised Statutes the right of the court of Special Sessions to try a person for any of the offences therein specified is given, subject to the request of such person to be so tried, or to his failure or refusal to give bail, for twenty-four hours after being required by the magistrate.

But the right of such court, under this act, is subject to no such conditions. On this point, as well as the others in the case, I agree fully with Welles, Justice, in *The People v. Fisher*, (20th Barb. 652).

It is contended that if this is the true construction of the act, it is, in this respect, in violation of the constitutional provision that, "the trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever." It is conceded that the jury here referred to is a common law jury of twelve men. This act only allows a jury of six before a court of Special Sessions, and this clearly is not the jury intended by the constitution.

The terms "as heretofore used" in the constitution, mean as used, before the adoption of the existing constitution. (*Cruger agt. The Hudson River Railroad Co.*, (2 Kern. 198, per Johnson J.) *Duffy v. The People* (6 Hill, 78).)

Trials for offences of this grade have been uniformly authorized, and had long before the adoption of the present constitution, and, indeed under all our previous constitutions, without the use of a jury, or with a jury of only six. It was ex-

pressly held by the court for the correction of errors, in the case last cited, that a statute which authorized a magistrate to convict a person of being a disorderly person, which included the power of sentence and commitment to jail was constitutional, although it did not give the right of trial by jury. And in that case the power of the legislature to confer upon courts of Special Sessions the right to try offences below the grade of felony without indictment, and without a jury, is fully recognized and sanctioned. It is argued that the right to have a trial by a common law jury was secured to every one charged with a misdemeanor under the provisions of the Revised Statutes, allowing them to give bail for appearance at a higher court. And hence the inference is sought to be drawn, that the right has never been taken away in any case, but has always been used, and consequently, that the legislature had no right to take it away in these cases.

It will be seen, however, that although by the Revised Statutes, the jurisdiction of the Special Sessions to try and punish is made subject to certain conditions, the right of trial by jury is by no means there secured in all cases.

If a person is unable to furnish bail, to appear at another court, it is the right and duty of that court to try him notwithstanding his desire or demand, to be tried elsewhere. This is as much a violation of his right, if it is one secured by the constitution, as though the statute had in terms forbidden the magistrate to take bail.

But it is a question of the power of the legislature to confer the jurisdiction upon these courts, and that question can never be made to depend upon the consent or request of the person accused, to be tried, or upon his ability to furnish bail to appear at another court. It is a privilege given by the legislature in such cases, which might have been withheld. The power of the legislature to determine before what courts, with or without a jury, offences of this character shall be tried, is I think undoubted. This view answers the other objection, that a trial and conviction, before such a court, is not by due process of law.

The People v. Toynbee.

The case shows that the offence was committed in the presence of a policeman, who thereupon seized the bottle of champagne so sold, and the bottle of brandy, and its contents, from which the quantity sold to be drank had been taken. The right, therefore, to search for liquors, supposed or suspected to be kept for unlawful purposes, does not arise in the case. The court before whom the defendant was tried, adjudged that the liquor was unlawfully kept and that it was forfeited, and issued his warrant for its destruction.

It is contended that no person can be deprived of his property in this manner. If the trial and conviction are by due course of law, it is difficult to see upon what foundation this objection can rest. The power of the legislature to authorize and impose, by way of penalty, the forfeiture, upon judicial sentence, of property kept, or sought to be used, contrary to law, can not at this day be seriously questioned. It is the lowest grade and form of punishment for offences against the law, and has been too long and steadily exercised, without question, to be now involved in any doubt. Instances of the exercise of this power must be too familiar to every lawyer to need citation.

The act of seizure by the officer was clearly lawful. The unlawful act was open and flagrant in the officer's presence, and it would have been a gross and inexcusable breach of duty, on his part, had he overlooked it.

The twelfth section authorizes the seizure by an officer under such circumstances, without warrant, to be taken before a magistrate, as was done in this case.

The conviction and sentence was therefore, in my judgment, in all respects lawful and proper, and the judgment of the Supreme Court should be reversed.

In determining this case, the Court of Appeals established the following propositions:

1. That the prohibitory act, in its operation upon property in intoxicating liquors existing in the hands of any citizen of this state when the act took effect, is a violation of the provi-

The People v. Toynbee.

sion in the constitution of this state, which declares that no person shall be "deprived of life, liberty or property, without due process of law." The court is of opinion that the various provisions, prohibitions and penalties contained in the act, substantially destroy the property in such liquors, in violation of the terms and spirit of the constitutional provision.

2. That inasmuch as the act does not discriminate between such liquors existing when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant any defence based upon the distinction referred to, it can not be sustained in respect to any such liquor, whether existing at the time the act took effect, or acquired subsequently; although all the judges were of opinion that it would be competent for the legislature to pass such an act as the one under consideration (except as to some of the forms of proceeding to enforce it) provided such act should be plainly and distinctly prospective as to the property on which it should operate.

3. That the proceeding in a court of Special Sessions authorized by the said act is unconstitutional and void, on the ground that the party accused is thereby deprived of the right of trial by jury guaranteed by the constitution.

Judges MITCHELL, WRIGHT and T. A. JOHNSON did not concur in the conclusions arrived at by the majority of the court, upon the first and second of the above mentioned propositions; and Judges WRIGHT and T. A. JOHNSON did not concur in the last proposition.

Judgment of the Supreme Court affirmed.

NEW YORK OYER AND TERMINER. April 10, 1855. *E. P. Cowles*, Justice of the Supreme Court, presiding.

THE PEOPLE *vs.* HYLER and others.

A grand jury has full power to make inquiry and to present by indictment, all persons charged with crime, whether such persons are or are not under arrest and examination before any of the magistrates of the county.

It is no good reason for quashing an indictment, that at the time it was found, the defendants were under arrest on a warrant issued by the coroner, after an inquisition found by a coroner's jury implicating the defendants in the crime, and that the preliminary examination before the coroner had not been brought to a close.

Where a coroner's jury finds that a murder has been committed and the coroner binds over the witnesses to appear at the next criminal court at which an indictment can be found, it is the duty of the grand jury to proceed at once to act upon the case without reference to the facts whether the accused is in custody or whether he is then under examination before the coroner.

This was a motion to quash an indictment for murder on grounds fully stated in the opinion of the court.

H. F. Clark, for the defendants.

A. O. Hall (District Attorney) for the people.

After taking time for consideration, the following opinion was delivered by

COWLES, J.—This is a motion made in behalf of the defendants, Hyler, Linn, Morrissey and Irving, to quash the indictment and remand the parties back for a preliminary examination, on the ground that after the coroner's jury had returned their inquisition, implicating them as accessories to the murder of Wm. Poole, they were arrested by warrant issued by the coroner. That they thereupon demanded, but were refused by him an examination, by witnesses to be called either for or against them, the coroner holding that under the statute he had no power to do more than take the personal statements or

The People v. Hyler.

examination of the defendants without oath. It will not be necessary now to discuss the question whether the coroner was right or otherwise in his construction of the law, further than to say that upon an examination of the statute I have arrived at the same conclusion with Mr. Justice Morris, when that question arose before him; and without stopping to assign my reason, shall hold for all the purposes of this motion that the coroner erred in denying the defendants the examination they demanded. The question then arises, "Have the defendants, by reason of such refusal, a claim upon the court for its interposition, as now moved for by them? It was not contended on the argument that there has been any irregularity in the finding of this indictment; for it can not be denied that the grand jury have full power to make inquiry, and present, by indictment, all persons charged with crime; and that, too, whether such persons are or are not under arrest and examination before any of the magistrates of the county. But it is contended that where a party is arrested before indictment, there is a manifest impropriety and undue haste on the part of the grand jury in entertaining a complaint and proceeding to indict until the preliminary examination shall have been brought to a close, and that while the statute has not inhibited the grand jury from acting upon that class of cases, yet that a quasi right is possessed by the accused to have such examination fully closed before being presented by the grand jury. I will not deny that in many cases, if the grand jury are apprized of the facts that the party is under arrest, and that the committing magistrate is proceeding with a full examination into the facts and circumstances attending the alleged offence, and particularly in that class of cases the prosecution of which is initiated upon the complaint of the individual, and so assume a character in some degree personal to the prosecutor, it would be very wise and judicious in the grand jury to defer action until the magistrate has made return of all the testimony taken before him. This will always enable both the grand jury and the public prosecutor, by an inspection of the return, to judge of its character and form some opinion as to the probability of guilt or inno-

The People v. Hyler.

cence, and the propriety of further prosecution. Such a discretion, if it exists on the part of the grand jury, would apply to all those cases where the original complaint is made to a justice of the peace, and to all other cases where a return of the proceedings and examinations had are not made or the witnesses recognized to appear and testify before the grand jury until the final close of the investigation before the committing magistrate. But an examination of the statute will show that in this case the grand jury possessed no such discretion. That they could not, had they been apprized of the fact that these parties were under arrest and before the coroner for examination, defer their own action, but were bound, if the testimony warranted, to indict. By 2 Revised Statutes, 742, article 1st, in regard to coroner's inquests, it will be seen that upon notice received by the coroner that any person has been slain, it is the coroner's duty forthwith to summon a jury to appear before him and make inquisition concerning such death. By section five, it is provided that the jury, after inspection of the body and hearing the testimony, shall deliver to the coroner their inquisition in writing, in which they are to certify the cause, manner and circumstances of the death, "and who were guilty thereof, either as principal or accessory, and in what manner."

Section six provides that if "the jury find that any murder, manslaughter or assault has been committed, the coroner shall bind over the witnesses to appear and testify at the next criminal court at which an indictment for such an offence can be found that shall be held in the county," and the last clause of the same section further provides that if "the party charged with any such offence be not in custody, the coroner shall have power to issue process for his apprehension in the same manner as a justice of the peace."

Thus it will be seen, that by express mandate of the statute, the moment the coroner's jury found and subscribed their verdict, the whole matter, with all the witnesses, was sent to the grand jury — sent to them to act upon at once, and with no discretion to delay their proceeding upon the charge,

The People v. Hyler.

whether the accused were or were not in custody, or whether they were or were not under examination before the coroner, as provided in section seven. The case is therefore entirely unlike that other class to which I have heretofore alluded where the returns are not made nor the witnesses bound over to appear and testify until the preliminary examination is closed; and it would be, in my judgment, just as much a dereliction of duty in the grand jury to refuse to act after the coroner's inquisition had been returned, as it would to give a similar refusal after the return of the preliminary examination by the committing magistrate in that class of cases. If I am right in the view I have taken of the mandatory character of the statute which controlled the action of the grand jury in this case, there is of course no ground on which this motion can be granted. That the indictment is regular is conceded, and the court can not be held to possess a discretion to set aside an indictment as prematurely found in a case where the grand jury have none to refuse finding it. The motion to quash must therefore be denied.

NEW YORK OYER AND TERMINER. April, 1855. Before *E. P. Cowler*, Justice of the Supreme Court.

THE PEOPLE *vs.* HYLER and others.

On a motion to admit to bail, on an indictment for murder, upon the testimony taken before the coroner and before the grand jury, the defendants will not be permitted to furnish further proof, either by affidavits or oral testimony, tending to establish their innocence.

The court in all cases, capital or otherwise, exercises its discretionary powers to admit to bail, when upon examination of the testimony under which the accused is held, the presumption of guilt is not strong; and the court is particularly called upon to bail in all cases, where the presumptions are decidedly in favor of the innocence of the accused.

A grand jury ought not to find an indictment, unless the testimony against the accused, *ex parte* and unexplained, is sufficient to convict.

The defendants had been indicted for the murder of William Poole. A motion was made to admit them to bail.

Russell, for defendant Van Pelt.

Nye and *H. F. Clark*, for the other defendants.

A. Oakey Hall, (District Attorney,) for the people

By the Court, COWLES, J.—This is an application to admit to bail all of the defendants except Baker who is still at large. The motion is based upon the testimony taken before the coroner, and that taken before the grand jury, on which the indictment was found. The defendants at the same time ask leave to furnish further proof, by affidavit or oral testimony, on the subject, showing their innocence of the offence charged, as affecting the question of bail. The district attorney at the same time also moves for an increase of the bail heretofore taken from the defendant Irving. The first question to be settled is, whether such proof can be received. After a careful examination of the subject, I have come to the conclusion that

such proof can not be received. It has not been the practice heretofore, either in this country or in England, nor can such a precedent be established without making an application for bail substantially a trial upon the merits; for if the prisoner can produce such evidence in his own behalf, the public prosecutor should be permitted to controvert it, which, in effect would transform a motion to bail into an examination into the guilt or innocence of the prisoners. The rule seems to be well settled to the contrary, and with reason, because, to open the whole question of guilt or innocence to proof on a motion to admit to bail, would be attended with most serious public inconvenience. In most cases there will be extant on the files of the court, the preliminary examination of the accused, or the testimony before the coroner, or that before the grand jury; in some cases all. True, as in this case, a party may sometimes, by casualty be deprived of the benefit of a preliminary examination, but the hardship in a particular instance should not induce the establishment of a precedent which would prove of great public inconvenience. The motion to put in proof must therefore be denied.

This brings us to the main question. The power of the court to bail is unquestioned. But the principles which will guide the court in the exercise of this power have been well established, and will be recognized here as the true rule by which to be governed. It has been said that in the higher class of offences, particularly of a capital nature, a court will not bail after indictment, although they may before. This distinction has arisen from the fact that in one case the court have before it the testimony taken before the coroner's jury, or before the committing magistrate, and can thus, by an inspection of the testimony, be enabled to form some judgment as to probable guilt or innocence; while in the other case, the old rule did not permit the testimony before the grand jury to be disclosed, and the court were, therefore, after indictment, unable to say on what proof it had been found. In *Lord Mohan's case*, (1 *Salk.* 104,) it was said, "If a man be found guilty of murder by a coroner's inquest, we sometimes bail him because the

The People v. Hyler.

coroner proceeds upon depositions taken in writing which we may look into; otherwise, if a man be found guilty of murder by a grand jury, because the court can not take notice of their evidence, which they by their oath are bound to conceal." "A man charged with murder by the verdict of a coroner's inquest may be admitted to bail, though not after the finding of an indictment by a grand jury." (1 *Chitty Crim. Law*, 129, *Am. ed. of 1836*.) And the reason is the same as above given. So in 1 *Martin Louis. Rep.* 142, *The Territory v. Benoit*, the court say: "On a coroner's inquest finding a person guilty of a capital crime, the judges have often looked into the testimony, which the coroner is bound to record, and when they have been of opinion that the jurors had drawn an illogical opinion, admitted the parties to bail. But as the evidence before the grand jury is not written, and can not be disclosed, the same discretion and control can not be exercised, and the judges can not help considering the finding of a grand jury too great a presumption of the defendant's guilt to bail him." Other instances to the same effect might be cited, all showing that the distinction made between bailing in capital cases before or after indictment has been founded on the reasons above given; that before the indictment the court have access to the depositions and testimony on which the charge is based, and in the other case could not, because the grand jury were required to keep the testimony before it secret; and the court having no means of inferring otherwise, would, therefore, always imply that the grand jury had not indicted on insufficient proof, and so refuse to bail. Such difficulty, however, does not exist in this case. It is provided by 2 *R. S.* 724, § 30, that "every grand jury may appoint one of their number to be a clerk thereof, to preserve minutes of their proceedings, and of the evidence given before them, &c., which was done here; and the whole evidence taken before the grand jury who found this bill, it is admitted is before the court, consisting of the record of the testimony taken before the coroner's jury, which was also read before the grand jury, together with a full record of all other facts testified to before the grand jury. The ques-

The People v. Hyler.

tion of bail is, therefore, open to consideration to the same extent as it would be if applied for before indictment, for the court know on what testimony this indictment was found. The question then arises, under what circumstances can bail be given in cases like the present? In the case of the *People v. Goodwin*, (1 *Wheeler Crim. Cases*, 445,) the late Chief Justice Spencer says: "That if it stands indifferent whether a person charged with a felony be guilty or not, he ought to be bailed and that even in capital cases, where there are any circumstances to induce the court to suppose he may be innocent, they will bail." That most eminent jurist, in the same case, after stating further that there is no fixed or certain rule for every case, but that each one must be governed by the peculiar circumstances attending it, says: "The object of imprisonment before conviction is to secure the forthcoming of the person charged with the commission of a crime, and it is never intended as any part of the punishment, for until the guilt of the party be legally ascertained there is no ground for punishment, and it would be cruel and unjust to inflict it." The laws (says he,) of every free country estimate personal liberty as of the most sacred character, and it is not to be violated or abridged before trial. "If (he further says,) the punishment be death or corporeal imprisonment, a consciousness of guilt would probably induce flight and an evasion of the punishment, and in admitting to bail therefore, regard must be had to the probable guilt of the party, and the nature of the punishment." He then proceeds to recapitulate the facts in that particular case which was for manslaughter, stated the prisoner had once been tried and the jury disagreed; that the foreman had, when called, rendered a verdict of guilty, but that on being polled, one of the jury dissented, and then proceeds: "I am therefore bound to presume that the prisoner may be innocent of the offence. In such a case as I understand the law, he is entitled to be bailed." These principles were approved by the court in the case of *Tayloe*, (5 *Cowen*, 39,) which was a case of homicide before indictment, and in that case, after approving of the rule laid down by Chief Justice Spencer in the case above cited, Chief

The People v. Hyler.

Justice Savage says: "If the facts in the case now before the court afford the same presumptions of innocence, and it appears to the court from the depositions that it is quite indifferent whether he is guilty, then in my opinion he ought to be bailed, otherwise not." The same rule has been repeatedly recognized in England. *Hawkins Pleas of the Crown*, B. 2, ch. 15, § 40 to 50; *Rex v. Dalton*, 2 Str. 911.) In *Com. Digest*, Bail F, it is said, "the court will not bail in murder, treason, &c., unless there be reasonable cause." The criminal code of Louisiana, contains a provision, which seems to be a summary of the common law rule on this subject. Article 192 provides that "All persons shall be bailable except for capital offences, where the proof is evident and the presumption great;" and then reciting that murder, rape, and some other offences, are punishable with death, proceeds: "Persons accused of the offences above enumerated, (capital offences) are also to be bailed when the proof is not evident nor the presumption strong." The general proposition deducible from the foregoing authorities is, that the court in all cases, capital or otherwise, exercises its discretionary powers to admit to bail, when from the testimony under which the accused is held, it is indifferent whether he be innocent or guilty; in other words, when upon examination of the testimony, the presumption of guilt is not strong, and they are particularly called upon to bail in all cases where the presumptions are decidedly in favor of the innocence of the accused.

It may be well here also to inquire on what testimony an indictment should be based. I am satisfied that this most important matter is oftentimes overlooked, and still oftener, perhaps, misunderstood by our grand juries; and yet such is the very nature of the organization of a grand jury; such its mode of proceeding, the secrecy of its action, and the *ex parte* character of the testimony taken before it, that these errors are rarely, and then only incidentally, brought before the court for review. These errors the court should vigilantly watch, and, as far as practicable, correct. In no case is injustice more likely to be done, than in the finding of indictments on insuffi-

The People v. Hyler.

cient proof; an injustice difficult to be guarded against, and yet oftentimes most oppressive in its consequences to the accused. I can not regard the indictment as in theory a mere accusation based upon probable cause to believe the accused may be guilty, like the finding of the committing magistrate, but as a direct and positive charge on oath that upon the testimony before the grand jury, *ex parte* and unexplained, the jury find he is guilty.

In 1 *Chitty Crim. Law*, 318, it is said: "Formerly it was laid down that a grand jury ought to find the bill, if probable evidence were adduced to support it, because it is only an accusation, and the defendant will afterwards defend himself before a more public tribunal. But great authorities have taken a more merciful view of the subject, and considering the ignominy, the dangers of perjury, the anxiety of delay, and the misery of a prison, have argued that the grand inquest ought, as far as the evidence before them goes, to be convinced of the guilt of the defendant. What was therefore anciently said of petit treason may be applied to all other offences, that since it is preferred in the absence of the prisoner, it ought to be supported by substantial testimonies." "Indictments," says Lord Coke, "being the foundation of all capital proceedings, found in the absence of the party accused, and only the evidence for the king being adduced, it is necessary that the proof of the offence should be substantial." (3 *Coke Inst.* 25.) In a note to 4 *Hawkins Pleas of the Crown*, p. 82, we find the following: "It has been observed with great strength of argument that a grand jury ought to have the same persuasion of the truth as a petit jury or a coroner's inquest." (*Vide also* 4 *State Trials*, 183.) Blackstone uses the following language: "A grand jury ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes, and not to rest satisfied merely with remote possibilities; a doctrine that might be applied to very oppressive purposes." (4 *Bl. Com.* 303.) The rule, as thus laid down, I believe to be the true one. No other, in my judgment, is safe, nor is it to be tolerated that a citizen shall be charged with a serious offence, and sent to a petit jury for

The People v. Hyler.

trial, unless the *ex parte* testimony taken in his absence, with no power of cross-examination, shall at least, if unexplained, show him guilty. This is implied in the very language of the indictment: "The jurors, &c. upon their oaths present that A B is guilty," &c. How upon their oaths can they say the accused is guilty, unless as the testimony stands before them, the proof unexplained would lead logically to such conclusion? Is it to be tolerated that grand juries are to speculate upon the chances of the guilt or innocence of the citizen? If the grand jury can not say that the testimony they have taken *ex parte* is strong enough to lead to conclusion of guilt, is the citizen to be subjected to all the ignominy of an indictment, and the rigors perhaps of a long confinement in a prison, to the injury of his health and character, and the ruin of his business, on a suspicion merely that he may be guilty? I do not so understand the law, but as above stated, that the testimony must be sufficient in degree to convict, if unexplained. Such are the principles which must govern in the cases now before the court.

The parties who apply for bail, seven in number, viz: McLaughlin alias Pargene, Turner, Hyler, Lynn, Van Peit, Morrissey and Irving, are all charged by the indictment as accessories to the murder of William Poole. The testimony shows that upon the evening of the homicide, without anticipation of a meeting by either party, Morrissey and the deceased met in a public house in this city; that they were enemies; that on meeting a violent quarrel ensued between them, and much feeling was excited; that Poole, supposing probably he would be assaulted, drew a pistol and pointed it at Morrissey; that Morrissey was soon furnished with one, which he snapped at Poole; that at this time Irving interfered, and attempted to prevent any difficulty, and that after much excitement, but no blows given, the parties were separated by the arrest of both Poole and Morrissey, both of whom were taken away and in opposite directions. None of the accused were present at this first quarrel but Morrissey, Irving and Hyler. As the parties were taken from the house, Irving also left, and was not seen in company with the accused again that

The People v. Hyler.

night, and the weight of the testimony is that he went directly home and did not hear of the subsequent affray until the next morning. The only other testimony as to Irving is that some months before this he had been heard to make threats in regard to Poole, and to declare his intention to procure his death. As to Morrissey the whole testimony goes to show that after the difficulty, he in company with some of the accused and others, called at different drinking places; that he became very much intoxicated, and was taken home before the second affray in a state of senseless inebriation. There is no evidence that he conspired with any other parties to have a further collision with Poole that night, or expected one, and the inference from the testimony is conclusive that he knew nothing of the subsequent difficulty which resulted in Poole's being shot, until after the occurrence and was then in too inebriated a state to be made to know it until the next morning. As to Hyler, Lynn, and Van Pelt, the theory of the prosecution is that they in conjunction with Baker, Pargene, and Turner, formed a conspiracy for the purpose of a joint attack the same night upon Poole, and together went to the scene of the first difficulty with that end in view. That these parties last named did go to the scene of the homicide and probably in company, is true. That a difficulty soon ensued between a portion of the party and Poole, is equally true, and Poole received a shot which resulted in his death some days after. To connect Hyler, Lynn, or Van Pelt with this shooting, so as to make either one liable as an accessory, it is necessary for the prosecution to first establish a guilty confederacy among them having that end in view; for, so far as the proof shows, no overt act on the part of either of these three parties was committed after they entered Stanwix Hall, which indicated any participation in the attack on Poole. Van Pelt on that occasion, as the evidence shows, interfered with Pargene, one of the accused, to prevent his assault on Poole, and was knocked down for his attempt and immediately left the house. Neither Lynn nor Hyler joined in the attack that was made, nor in any way showed a hostile purpose by

The People v. Hyler.

any overt act. The strongest view that can be taken of the case unfavorably to the defendants, Hyler, Lynn, and Van Pelt, is that there are strong suspicions that they may have known Poole was at Stanwix Hall, and went there with others to attack him or at least to witness the attack. There are some circumstances which favor such a theory, but as far as the circumstances in proof now go, they are not sufficient of themselves without other proof to warrant a finding that it was so. The case as to them therefore falls within the rule laid down in the *People v. Goodwin*, (1 *Wheeler Crim. Cas.* above cited.) As was said by Chief Justice Spencer in that case, so am I compelled to say in this, "I am bound to presume they may be innocent of the offence." I am equally bound to say that the proof as it now stands, would not justify the conviction of Hyler, Lynn or Van Pelt. They must therefore be admitted to bail.

As regards Irving and Morrissey, I must go still further and say that upon the testimony, I am entirely clear, there is not only none on which a conviction can be had, but that the proof did not warrant the finding of the indictment. Whatever may have been the errors or the follies of either Irving or Morrissey, it will not answer to allow of a precedent so dangerous to the liberty of the citizen as that of upholding an indictment based on testimony so utterly insufficient, and while the grand jury in the discharge of its most responsible and important duties, will always have the firm and steady support of this court, the court must with equal firmness and fidelity guard the personal rights of the citizen against the consequences of so dangerous a precedent as that of sustaining or favoring an indictment the finding of which is so utterly unwarranted by the proof.

It only remains to fix upon the amount of the bail to be given by the several parties. That of Irving having been already fixed by Mr. Justice Morris, will remain undisturbed.

Morrissey must be admitted to bail in the sum of ten thousand dollars.

Hyler, Lynn and Van Pelt must be admitted in the sum of twenty thousand dollars each.

The People v. Christie.

Proper notice in each of the cases must be given to the district attorney of the persons proposed as bail, that he may inquire into their sufficiency.

As to the other two parties (Turner and Pargene) who have applied for bail, it is only necessary to say that the application in their behalf must be denied.

At a subsequent day, on the suggestion of the prisoner's counsel, assented to by the district attorney, that the bail fixed was beyond the ability of some of the parties to furnish, the court modified the order, fixing the bail of Van Pelt at \$4000, of Lynn and Hyler at \$10,000 each, which was given as thus fixed, by all the parties.

NEW YORK GENERAL TERM. November, 1855. *Clerke, Morris and Mitchell*, Justices.

THE PEOPLE vs. EDWARD CHRISTIE and others.

Where a juror, on being called, is challenged on the ground of his having formed or expressed an opinion as to the guilt of the prisoner, such juror may be examined as a witness for the purpose of sustaining the challenge. A juror when examined as a witness for the purpose of sustaining a challenge to the favor, will not be excused from answering whether he has any prejudice or bias against a religious sect, on the ground that such answer would disgrace him.

Where on the trial of several defendants on an indictment for a riot, it appeared that a secret society had been organized for the purpose of repressing the class or sect to which the defendants belonged, it was held to be competent to require a witness, who had been called and testified on the part of the prosecution, to answer on his cross-examination, whether he was a member of such secret society.

Certiorari to the New York General Sessions. The defendants were jointly indicted for riot, committed in the ninth ward of the city of New York, on the 4th day of July, 1853; the defendants pleaded not guilty; and on the 14th day of December, 1853, the issue of traverse so joined, came on to be tried

The People v. Christie.

before Hon. Francis Tillou, recorder, &c., the defendants being tried jointly.

On the first juror, Samuel Carson, being called, he was challenged for principal cause by the defendants, on the ground of his having formed or expressed an opinion of the guilt of the prisoners, or some of them. This challenge was denied by the people, and issue was thereupon joined. The defendant's counsel, John McKeon, offered as a witness, to prove the challenge, the juror himself. This was objected to by the people, and the objection sustained by the court; to which decision the defendant's counsel excepted.

It was admitted for the purpose of the argument as to the challenge of jurors, that on the 4th day of July last past, there was a procession of a society called the Ancient Order of Hibernians, a society composed of Irishmen and Roman Catholics; that the defendants were members of that society. And it was admitted, for the purpose of the argument as to the challenge of jurors, that a portion of the defendants are Catholics, and a portion foreigners; that the alleged riot took place in the neighborhood of Abingdon square, in the ninth ward of the city of New York, through which the procession passed, and that during the riot, expressions of a hostile and insulting character were used by some of the parties engaged, as for instance, "kill the d—d Irish," "kill the d—d Popish ———," "kill the d—d Yankees." It was also contended by the defendants' counsel, for the purpose of the challenge to jurors, that a strong prejudice existed amongst the police and inhabitants of that section of the city against Irish and Roman Catholics.

Several jurors were called and rejected; some were peremptorily challenged; one of the jurors being called and challenged to the favor, on the ground that he had a bias, prejudice or impression against the prisoners or some of them, triers were appointed by court; one juror so challenged for favor was rejected by the triers, when James Black was called as a juror, who was challenged to the favor by defendants' counsel, on the ground that the juror called had a bias, preju-

The People v. Christie.

dice or impression against the defendants or some one of them.

This challenge was denied by the people, and issue was thereupon joined. The same triers as in the former cases were, by consent, in this case appointed. The defendants called as a witness to prove the challenge, the juror so called, who, after answering several questions in relation to the ground of challenge, was asked the following question:

Q. Have you any bias or prejudice against Roman Catholics?

To this question the district attorney objected, and contended that the juror was not bound to answer, if he thought it would disgrace him. The court sustained the objection of the district attorney, to which decision the counsel for defendants excepted. The court thereupon informed the witness that he was not bound to answer the question, if in his opinion the answer would tend to disgrace him; to which instruction and decision the defendants' counsel excepted. On the question being put, the juror declined to answer.

The defendants then moved the court to compel the juror, as being a witness, to answer the question, which the court refused to do. To which decision and refusal the defendant's counsel excepted.

Timothy H. West was called as a witness on the part of the prosecution, and testified as follows: That he lived in No. 23 Eighth avenue; is a house carpenter; saw the procession; there was a space of twelve feet or more through which the stage driver passed; heard the expression—"Kill the d—d son of —." After witness left his son in Troy street, witness returned to the stage. He then met a policeman and told him the "Order of Hibernians had attacked the stage-driver, and were about to murder him on the spot." McPherson went in and told them to disperse; two men made a pass at him; I stepped back to Eighth avenue; he did not see the marshal at the time of the affair with the stage.

On being cross-examined, the witness was asked:

Q. Do you belong to the Order of United Americans?

This question was objected to by the people. The objection

The People v. Christie.

was sustained by the court, and to this decision the counsel for the defendants excepted. The following question was then put:

Q. Do you belong to any order?

This question was objected to by the people. The objection was sustained, and to which decision the defendants excepted.

N. Bowditch Blunt (District Attorney) for the people.

John McKeon for the defendant

By the Court, MORRIS, J.—At the foundation of American jurisprudence, is the right to be tried by an impartial, unprejudiced jury; it is a right paramount to all others, and is not to be sacrificed to the fear or apprehension of wounding the feelings of others.

In this case, a new trial should be ordered for the following errors:

1st. The juror, Carson, should have been received as a witness to prove that he had formed or expressed an opinion of the guilt of the prisoners, or of some of them.

The juror who has formed an opinion and has not expressed it, is the only source from which the fact of the "formed opinion" can be obtained. There is neither dishonor or disgrace attached to the fact, that a man had formed an opinion upon any subject which agitated public consideration, and there is no reason why the juror should not be used as a witness, to prove the cause of challenge.

The prosecution at the trial did not object that the challenge assigned against this juror, should not have been for principal cause, but to the favor, and, therefore, he can not take such position here.

2d. Under the admissions of facts made by the counsel as the foundation of challenge, the court erred in refusing to compel the juror, Black, to answer the question, whether he had "any prejudice or bias against Roman Catholics."

This question should have been permitted.

Osborne v. The People.

3d. The question to the witness West, whether he belonged "to the Order of United Americans," should have been permitted by the court; for had it, by the witness, been shown that he did, and that such order was established with prejudice against, and to oppose Irish and Roman Catholics, such fact was proper for the jury to receive, to enable them to determine how much, if any, the witness's evidence was warped by the principles of his order.

Proceedings reversed

SUPREME COURT. Essex General Term, July, 1855. *C. L. Allen, Bockes and James*, Justices.

OBADIAH OSBORNE pl'ff in error vs. THE PEOPLE def'ts in error.

On a trial for burglary, it is no valid objection to evidence tending to characterize the burglarious intent of the acts charged, that the circumstances offered to be proved, would, upon the trial of another and distinct offence, tend to convict the prisoner of such latter charge; but the intent with which the prisoner entered may be determined by proof of circumstances tending to show a felony committed in an adjoining store.

Writ of error to the Saratoga county Sessions. The plaintiff in error was indicted with two others for burglary, in breaking and entering the grocery of one Hall in the night time with intent, &c. He was tried on the indictment at the Saratoga Sessions held in March last, and convicted.

The grocery of Hall, together with the shoe store of one Van Epps, were in the same building, each having a separate front door, and in no wise connected except that in the rear there was a passage way common to both. On the trial Van Epps was sworn as a witness, and during his examination was asked if he missed any boots from his store on the night of the alleged burglary. The question was objected to by the counsel for the prisoner, as irrelevant and improper. The objection was over-

Osborne v. The People.

ruled and the prisoner excepted. The witness answered: "I am certain I missed two pairs of boots, if not more; they were missing next morning; I saw them afterwards." The counsel for prisoner objected to the witness stating where he saw said boots "as irrelevant and improper evidence; that if the boots were taken on the night in question and subsequently found at a place that might lead the jury to believe the prisoner took them, it was not legal and proper evidence on the trial of this indictment." The court overruled the objection, and the prisoner excepted. The witness answered: "I saw those boots the next day at the house of the father of prisoner; they were pulled from under the buttery floor." It further appeared in evidence that the prisoner at the time lived at home with his father, and was seen to enter his father's house about twelve o'clock on the night in question, procure a light, enter the buttery, remain a short time and retire. It also further appeared that the entrance to the grocery was effected by the prisoner and his associates by first entering the shop of Van Epps, passing through the same into the common passage way and from thence through a window into the grocery.

D. Wright, for the plaintiff in error.

W. T. Odell, (Dist. Att'y,) for the defendants in error.

By the Court, JAMES, J.—The counsel for the prisoner insists that the Court of Sessions erred in allowing, as evidence to characterize the intent of the acts charged as burglary in this indictment, proof of circumstances which upon a trial for another and distinct offence would tend to convict the prisoner of such latter charge; or in other words, that the intent with which the prisoner entered the grocery of Hall, should not be determined by proof of circumstances tending to show a felony committed in the store of Van Epps.

It is not to be disputed, that as a general rule both in civil and criminal cases, the evidence should be confined to the point in issue; and Phillips, in his treatise on evidence say: "In

Osborne v. The People.

criminal proceedings the necessity for strictly enforcing this rule is stronger than in civil cases, for when a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer." (1 *Phil. Ev.* 178.) Under this rule it would not be competent for the prosecution on the trial of a prisoner for an offence to give in evidence facts or circumstances tending to show the commission of another separate and distinct felony, for the purpose of raising an inference that the prisoner was guilty of the crime for which he was on trial." (*Ros. Cr. Ev.* 73.) But to this general rule there are many exceptions. For the purpose of identifying the person charged as the criminal, the prosecution has been allowed to show that other goods than those mentioned in the indictment, upon an adjoining part of the premises were stolen the same night, and afterwards found in the prisoner's possession. So where a man committed three burglaries in one night, and stole a shirt at one place and left it at another, they were all so connected that the court heard the history of the three burglaries. (2 *Leach*, 285.) And all facts upon which any reasonable presumption or inference can be founded as to the truth or falsity of the issue, are admissible in evidence. (6 *Verm.* 496; 2 *Gill & John.* 267.) Still facts and circumstances, tending to establish a separate and distinct felony from the one charged in the indictment on trial, are not within the exception to the above mentioned general rule, unless so connected as to form a part of the same general transaction. Of such character were the facts and circumstances objected and admitted in evidence on the trial of this case. The acts of the prisoner and his associates while in the grocery of Hall, rendered it somewhat doubtful whether the entry was a burglary or a trespass; hence the necessity of proof to show the intent. The entry of store and grocery must be regarded as one connected transaction; and therefore proof of any facts and circumstances tending to show the prisoner

The People v. Caniff.

guilty of larceny in the store of Van Epps on that occasion, was proper evidence to go to the jury to characterize the intent with which the prisoner broke and entered the grocery for which he stood indicted.

The ruling of the Court of Sessions was correct and a new trial is denied.

SUPREME COURT. St. Lawrence General Term, September, 1855. *C. L. Allen, Bockes and James*, Justices.

THE PEOPLE *vs.* JAMES CANIFF.

Under the statutes of the state of New York, the people, in a criminal prosecution, are entitled to two peremptory challenges.

On the trial of an indictment for burglary, it is not sufficient to prove that the goods of the prosecutor alleged to have been burglariously taken from his barn, were carried away from the barn in the night by the defendant, and were subsequently found in his possession; but the prosecutor must also prove that the barn was broken open and the goods stolen. Such facts should be proved by the testimony of the person in the immediate possession of the barn and the goods, or a satisfactory excuse should be given why he is not called as a witness.

The prisoner was indicted at the Saratoga Oyer and Terminer, held in October, 1853, for burglary in the third degree, and the indictment sent down to the General Sessions for trial. On the trial in the Sessions, the clerk in impanneling the jury drew from the box the name of Thomas L. Gleason, who answered to the call. To this person sitting as a jurymen, the district attorney on behalf of the prosecution interposed a peremptory challenge. The counsel for the prisoner denied the right of the people to such challenge. The court held that under the statute as they now stood, the people were entitled to two peremptory challenges, and set the jurymen aside. To which ruling and decision the counsel for the prisoner duly excepted. The charge against the prisoner was, that he had burglariously broke and entered the barn of one Benjamin

The People v. Caniff.

Wood, on the night of June 11, 1853, and taken and carried away therefrom, twelve fleeces of wool, the property of said Wood. A son of the said Wood testified, that on the night in question, thirty-seven fleeces of wool belonging to his father were put into his father's barn; that the barn stood beside the road, the front doors being fastened on the inside, and the back door by a staple and pin on the outside; that about sunrise, on the morning of the 12th of June, the back door of the barn was found open and twelve fleeces of the wool were gone; that there were tracks of a double horse team and wagon in front of the barn, and also those of a mare about the barn; that the off horse of the team had large feet and was shod; the near horse had small feet and was not shod. It also appeared in proof that prisoner drove a team answering such description, and was seen with it on the night in question in the vicinity of the barn. Twelve fleeces of wool, recognized to be those taken from the barn, were subsequently found on the lands of the prisoner, secreted in some elder bushes. Benjamin Wood, although about home at the time of the alleged burglary, was not called as a witness to prove the larceny. The counsel for the prisoner requested the court to charge the jury that it was not proved that said Wood had had any wool stolen from his barn; the court refused so to charge and the counsel for the prisoner excepted. The jury found the prisoner guilty. The cause having been brought up by certiorari, the prisoner now moves upon exceptions for a reversal and a new trial

W. T. Odell (District Attorney) for the people.

D. Wright, for prisoner.

By the Court, JAMES, J.—This case presents but two questions for our consideration. The first is, whether the people in criminal cases have the right of peremptory challenge to a juror; and the second is, was there proof sufficient to show that the barn was entered with an intent to commit a crime.

The first question has been decided both ways by the Supreme

The People v. Caniff.

Court. *First* in this district in the case of *The Waterford and Whitehall Turnpike Co. v. The People*, (9 Barb. 161,) where it was held that the people had such right of challenge, and subsequently in the case of *The People v. Henries*, (1 Park. Cr. Rep. 579,) determined in the seventh district, where such right was denied. Without entering into any discussion of the questions, or in any wise expressing an opinion on the reasoning advanced upon either side, we shall hold the question as *res judicata* in this district until overruled by the Court of Appeals.

Second. It will be observed that the proof, to establish that a crime had been committed, and to convict the prisoner with such offence, was all circumstantial, and may all have been true, and the prisoner innocent of the crime charged. In every criminal case the prisoner's guilt must be made out by evidence sufficiently conclusive to exclude any reasonable supposition of his innocence. Proof that stolen goods were found upon the person of the prisoner, or in his house or possession, is presumptive evidence against him of having stolen them, and sufficient to call upon him to explain his possession, but before any such presumption can arise, the goods found upon the accused must be shown to have been stolen. No presumption of guilt can arise from the bare possession of property, and no man is called upon to explain his possession of property until it is proved that it was stolen. (*Russell on Crimes*, 1153; *Cow. & Hill's notes*, p. 423 n. 325.) This proof should be by the owner of the property himself, if it was taken from his immediate possession. (*Murray's Case*, N. Y. Gen. Ses. 6, C. H. Rec. 65, 66.) In this case, the wool was sufficiently identified, and the circumstances under which it was found, together with the tracks of the horses, and the prisoner's whereabouts on the night in question, were amply sufficient to justify the jury in finding that the accused was the person who carried the wool from the barn. But the necessary evidence to show that the barn was broken open and the wool stolen therefrom, was wanting. The barn and wool being in the immediate possession of Benjamin Wood, he was the only

The People v. Caniff.

person who could testify directly to the burglary or larceny. He may have opened the barn and delivered the property himself, or consented to the prisoner's opening the barn and removing the wool. In either case, no crime was committed. Wood should have been called as a witness, or some satisfactory excuse rendered why he was not. It is a general rule that the best evidence of which the case is susceptible should be produced, and the court will not, in criminal cases, permit the prosecutor "to grope in the twilight of circumstantial evidence, when the broad day light of direct and positive proof is attainable."

The second point was well taken, and for that reason the conviction must be reversed and a new trial ordered

SUPREME COURT. Essex General Term. July, 1855. C. L.
Allen, James and Bockes, Justices.

THE PEOPLE *vs.* ALEXANDER MERRILL and JOSEPH RUSSELL.

A state has no jurisdiction of crimes committed beyond its territorial limits. Every statute is presumed to be enacted with reference to the local jurisdiction of the legislature of each state.

Section 32 of 2 R. S. 665, which provides for the punishment, as for a felony, of every person who shall sell, or in any manner transfer, for any term, the services or labor of any black, mulatto or other person of color, who shall have been forcibly taken, inveigled or kidnapped from this state to any other state, place or country is not applicable to a sale or transfer made in another state of a black inveigled in this state.

To give to it a broader construction, and make it applicable to a sale or transfer made in another state, would make it repugnant to the constitution of the United States, (amendment, art. 6) which declares that in criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury *of the state and district wherein the crime shall have been committed*, and also to art. 4, sec. 2 of the constitution of the United States, which declares that the citizens of each state shall be entitled to all the immunities of the citizens of the several states; and provides that a person charged in any state with treason, or felony, or other crime, who shall flee from justice, or shall be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

Forms of an indictment for kidnapping, with intent to sell, under sec. 28 of 2 R. S. 664 and of an indictment for inveigling a person of color and selling him as a slave under section 32,—and of demurrer and joinder in demurrer.

This was a writ of error to the Saratoga Oyer and Terminer, in which court the defendants were tried on the following indictment:

SARATOGA COUNTY, ss. *Be it remembered:* That at a court of General Sessions, holden at the court house, in the village of Ballston Spa, in and for the county of Saratoga, on the 28th day of August, 1854, before John A. Corey, county judge of the county of Saratoga, David Maxwell and Abram Sickler,

The People v. Merrill.

justices of the peace for sessions, in and for said county, and James W. Horton, clerk:

It is presented upon the oaths of the jurors, of the people of the state of New York, in and for the body of the county aforesaid, good and lawful men of the county aforesaid, then and there sworn and charged to inquire for the said people, for the body of the county aforesaid:—

First.—That Alexander Merrill and Joseph Russell, late of the town of Saratoga Springs, in the county of Saratoga aforesaid, on or about the tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, with force and arms, at the said town of Saratoga Springs, in the county of Saratoga aforesaid, without lawful authority, one Solomon Northup, he, the said Solomon Northup, there living a free negro and a citizen of the state of New York, and in the peace of God and the people of said state, then and there being, did unlawfully and feloniously inveigle and kidnap with intent, him, the said Samuel Northup, unlawfully and feloniously against his will and without his consent, to cause to be sold as a slave. And him, the said Solomon Northup, unlawfully and feloniously and against his will, did sell as a slave, against the statute in such case made and provided, and against the peace of the people of the state of New York, and their dignity, and the jurors aforesaid, upon their oaths aforesaid, do further present: that from the time the said Alexander Merrill and Joseph Russell, had so inveigled and kidnapped the said Solomon Northup, to wit: the tenth day of March, 1841, during and until the first day of July, 1854, they, the said Alexander Merrill and Joseph Russell, have not been the inhabitants of the state of New York.

Second.—And the jurors aforesaid, upon their oaths aforesaid, do further present:

That the said Alexander Merrill and Joseph Russell, late of the town of Saratoga Springs, in the county of Saratoga aforesaid, afterwards, to wit: on the said tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, with force and arms, at the said town of Saratoga Springs,

The People v. Merrill.

in the county of Saratoga aforesaid, without lawful authority, one Solomon Northup, he, the said Solomon Northup, then being a free negro and a citizen of the state of New York, and in the peace of God and of the people of the said state, then and there being, did unlawfully and feloniously inveigle to accompany them, the said Alexander Merrill and Joseph Russell, to the District of Columbia, with intent unlawfully and feloniously to cause the said Solomon Northup to be sold as a slave; and him, the said Solomon Northup, did then and there without his consent sell as a slave, to the great damage of the said Solomon Northup, against the statute in such case made and provided, and against the peace of the people of the state of New York and their dignity.

And the jurors aforesaid, upon their oaths aforesaid, do further present:

That from the time the said Alexander Merrill and Joseph Russell had inveigled the said Solomon Northup, and him, the said Solomon Northup, sold as a slave aforesaid, to wit: the tenth day of March, 1841, during and until the first day of July, 1854, they, the said Alexander Merrill and Joseph Russell, were not usually resident within the state of New York.

Third.—And the jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: on the tenth day of March, in the year of our Lord one thousand eight hundred and forty-one, at the town of Saratoga Springs, in the county of Saratoga aforesaid, one Solomon Northup, who was then a free negro and an inhabitant of the state of New York, was unlawfully and feloniously and without lawful authority, inveigled from this state to the city of Washington, in the district of Columbia, by the above mentioned Alexander Merrill and Joseph Russell. That the said Alexander Merrill and Joseph Russell, late of the said town of Saratoga Springs, in the said county of Saratoga, afterwards, to wit: on or about the first day of January, in the year of our Lord one thousand eight hundred and fifty-three, with force and arms, at the said city of Washington, unlawfully and feloniously sold and transferred the services and labor

The People v. Merrill.

convicted of of the said Solomon Northup, without his consent, to some person or persons to the jurors aforesaid unknown, for a term to the jurors aforesaid unknown, to the great damage of the said Solomon Northup, and against the statute in such case made and provided, and against the peace of the people of the state of New York, and their dignity.

Fourth.—And the jurors aforesaid, upon their oaths aforesaid, do further present:

That Alexander Merrill and Joseph Russell, late of the town of Saratoga Springs, in the county of Saratoga aforesaid, afterwards, to wit: on or about the first day of January, in the year of our Lord one thousand eight hundred and fifty-three, with force and arms, at the said town of Saratoga Springs, in the county of Saratoga aforesaid, without lawful authority, one Solomon Northup, then being a free negro and an inhabitant of the state of New York, and in the peace of God and of the people of the state of New York, then and there being, did unlawfully and feloniously inveigle from the state of New York to the city of Washington, in the District of Columbia, with intent, then and there, to cause the said Solomon Northup to be sold as a slave. And the said Alexander Merrill and Joseph Russell, him, the said Solomon Northup, did, then and there, with force and arms, unlawfully and feloniously sell as a slave to some person or persons to the jurors aforesaid unknown, to the great damage of him, the said Solomon Northup; against the statute in such case made and provided, and against the peace of the people of the state of New York, and their dignity.

To the first count the defendants pleaded not guilty.

To the second count the defendants demurred as follows:

And the said Alexander Merrill and Joseph Russell in their own proper persons, come into court here, having heard the second count of the said indictment read and say:

That the said count and the matters therein contained, in manner and form as the same are above stated and set forth,

The People v. Merrill.

are not sufficient in law, and that the said Alexander Merrill and Joseph Russell are not bound by the law of the land to answer the same, and this they are ready to verify; wherefore, for want of a sufficient indictment in this behalf, the said Alexander Merrill and Joseph Russell pray judgment, and that by the court they may be dismissed and discharged from the said premises in the said second count specified."

Similar demurrers were interposed to the third and fourth counts. The public prosecutor joined in demurrer as follows;

And William T. Odell, district attorney of Saratoga county, who prosecutes for the people of the state of New York in this behalf, saith:

"That the said second count in the said indictment, and the matters therein contained in manner and form as the same are above stated and set forth, are sufficient in law to compel the said Alexander Merrill and Joseph Russell to answer the same; and the said William T. Odell, who prosecutes as aforesaid, is ready to verify and prove the same as the court here shall direct and award; therefore, inasmuch as the said Alexander Merrill and Joseph Russell have not answered to the said count in the said indictment, nor hitherto in any manner denied the same, the said William T. Odell, for the said people, prays judgment on the said count, and that the said Alexander Merrill and Joseph Russell may be convicted of the premises in the said count specified."

Similar joinders were put in to the other demurrers. Judgment upon the demurrers to the second, third and fourth counts was given for the defendants, whereupon a writ of error was prosecuted by the district attorney to this court.

W. T. Odell (District Attorney) for the people.

Beach, Cochrane and Wait, for defendants.

By the Court, C. L. ALLEN, J.—There is no objection to the count under the thirtieth section, and to this count the defendants pleaded not guilty. That section enacts, that any person

The People v. Merrill.

the felony there declared, shall, upon conviction, be punished by imprisonment in a state prison not exceeding ten years. The offence there created and declared, is one arising upon the *intent* of the party *formed in this state*, and which constitutes the crime committed within the state, and to punish which, on conviction, the tribunals of the state have exclusive and perfect jurisdiction. The duelling act, so called, (2 R. S. 686,) provides for the punishment of those who shall thereafter fight a duel within the state, declaring the offence to be a felony; and then follows the fifth section against the same act, declaring, that if any inhabitant of the state shall leave the same for the purpose of eluding the operation of its provisions, *with the intent* of giving or receiving any challenge therein prohibited, or of aiding or abetting in giving or receiving such challenge, and shall give or receive any such challenge or shall aid or abet in giving and receiving the same without the state, he shall be deemed as guilty, *and shall be subject to the like punishment as if the offence had been committed within this state*. Here, again, the *intent conceived* in this state, was made to constitute the crime, the giving and receiving the challenge *without* the state being made evidence of *such intent*;—and the concluding part of the section declaring that *the punishment*, upon conviction of such *intent*, shall be the same *as if the offence had been committed within the state*, was a legislative construction or *adjudication*, if proper so to speak, that if the act were committed *without* the state, unaccompanied by the *intent conceived* by the *inhabitant* of the state *before leaving it*, our courts would have no jurisdiction over it.

But the thirty-fourth section of the act under which the objectionable counts in this case were framed, is somewhat broader in its terms as to assertion of jurisdiction than the section of the duelling act just adverted to. It declares that “every person who shall sell, or in any manner transfer, for any term, the services or labor of any black, mulatto, or other person of color, *who shall have been forcibly taken, inveigled or kidnapped* from this state, to any other state, place or country, shall, upon conviction, be punished by imprisonment in a state

The People v. Merrill.

prison not exceeding ten years, or in a county jail not exceeding one year, or by a fine not exceeding \$1,000, or by both such fine or imprisonment.”

It must be presumed, in construing this section, that the intention of the legislature was to confine the courts of the state, to the offences or felonies over which it had jurisdiction, and to them alone. It can not be pretended or assumed that a state has jurisdiction over crimes committed beyond its territorial limits. The first section of the 2 R. S., 697, (4 ed. 881,) declares that the several courts of justice organized under the constitution and laws of this state, possess the sole and exclusive jurisdiction of trying and punishing in the manner prescribed by law, all persons for offences and crimes committed *within the boundaries of this state*, and excepting only such as are exclusively cognizable by the courts deriving their jurisdiction under the laws and constitution of the United States. This enactment is in conformity to the law as always understood from the earliest period. (*Vattel's Law of Nations*, 108, *Story's Conflict of Laws*, 516, 518, 619, *et seq.*)

It was early adjudicated that our courts had no jurisdiction over offences committed in other states. In the case of *The People v. Wrights*, (2 *Caines' R.*, 213,) the defendants were in custody of the sheriff on heavy civil process, and while thus in custody a warrant was issued upon an indictment against them found in Massachusetts for a crime committed there. The court refused to commit them, saying they had no jurisdiction — and that the constitution pointed out the mode by which offenders could be claimed by a foreign state. The case of *The People v. Gardiner*, (2 *J. R.*, 477,) was one where the prisoner was indicted and convicted of felony at the General Sessions, in Washington county, for stealing a horse. It turned out in evidence that the original taking was in Vermont, but that the prisoner was arrested in Washington county with the horse in his possession. The court decided that the prisoner could not be tried for the offence in this state, the original taking having been without its jurisdiction, and that the offence did not continue and accompany the possession of the thing stolen, as it

The People v. Merrill.

did when property was stolen in one county in the state, and the thief was found in another county with the stolen property in his possession. In *The People v. Schenck* (2 J. R., 479,) the prisoner was discharged because it turned out that the gun, which he was charged with stealing, was taken in New Jersey, and brought into New York, and there offered for sale by him. But the court caused him to be detained in custody for thirteen weeks to enable the executive of New Jersey to apply for his delivery to the proper officers of that state. It is not improbable that these decisions, particularly the two latter, somewhat aided in the enactment, (2 R. S., 698, § 4,) by which it is declared that "every person who shall feloniously steal the property of another, in any other state or country, and shall bring the same into this state, may be convicted and punished in the same manner as if such larceny had been committed in this state;" and in every such case, such larceny may be charged to have been committed in any town or city into, or through which, such stolen property shall have been brought."

The case of the *People agt. Burke*, (11 Wend. 129,) was decided after the passage of this section. It appeared in evidence in that case, that the prisoner, who was indicted for grand larceny, and charged with having stolen money in the town of Gates, in the county of Monroe, stole the money in Upper Canada and came into Gates, where a part of the stolen money was found in his possession. The case, as was correctly remarked by the Chief Justice, Savage, came precisely within the statute, which was, in his opinion, constitutional, and was not justly liable to the objection, that the legislature undertook to punish offences committed against another government. Why? Because it was not the larceny in Canada which the court of this state undertook to punish, but that committed in the state of New York, in every place into which the stolen property had been brought. That the statute was only recognizing the common law, (*Sec. 1, Ch. Crim. Law*, p. 179; 13 *Coke*, 53,) by which the possession of stolen property, in contemplation of law, remains in the owner, and the thief is guilty of theft in every place into which he carries the stolen goods.

The People v. Merrill.

The offence is committed in this state by bringing the stolen property into it; "for being in possession of the stolen property;" *animo furandi*. The statute was likened to that for punishing persons having in their possession forged bank notes. "No one ever doubted," remarks the learned judge, "the propriety of a conviction if it appeared (as it generally does in such cases,) that the notes were actually forged in Canada. The offence is complete in this state by having them in *possession with intent to pass them*." So in the statute we are now considering, inveigling or enticing a colored man, in this state, out of its limits, with *intent* to sell him, constitutes the crime here, as before intimated.

The doctrine that a person can not be punished for a crime committed without the state, is not only not denied, but broadly admitted in the case in 11 Wend., as it was also in the cases of the *People* agt. *Sturdevant*, (23 Wend. 418,) and the *People* agt. *Charles*, (3 Denio, 212.) In both those cases the offence was complete by the publication of, or the sale of lottery tickets, *in this state*, though the lotteries in which they were sold, were authorized by the laws of other states.

The case also of the *People* agt. *Adams*, (3 Denio, 190,) affirms the same principles. The defendant was a resident of the state of Ohio, and in that state made and executed the false receipts and drafts by which the money was fraudulently, and by false pretences, obtained from the house in New York, the papers having been presented to the firm in New York by agents of the defendant, he having remained during the transaction in the state of Ohio.

The court held that the offence was committed where the false pretence was used, and where the money was obtained; and Beardsley, J., after a very able review of all the cases bearing upon the question, remarked, in delivering the opinion of the court, that the crime was committed in the city of New York, and not elsewhere; that the defendant, although acting through his innocent agents there, and not personally present within this state, was here in purpose and design, and acted by those agents; "*qui facit per alium facit per se*." That the crime

The People v. Merrill.

was perpetrated within this state, and that, therefore, our courts had an undoubted jurisdiction; that jurisdiction over the criminal necessarily followed, "*crimen trahit personam*," and the offender should be held responsible when afterwards found within the state; and the conclusion arrived at finally, was that, although civil redress for this violation of a statute of our state would be afforded by the courts of Ohio, as well as New York, yet that the law of this state creating the offence for which the defendant was indicted, could only be enforced by its own tribunals. The judgment in this case was affirmed by the Court of Appeals, (1 *Comst. R.* 173.) The court there reiterating the averment that the crime was committed *within the state*, and through the instrumentality of the defendant though absent from it, and a resident of another state at the time. One of the court remarked, that it was a matter of little consequence under the circumstances of the case, whether the defendant owed allegiance to the state or not; that there were only two cases where the question of allegiance could have any thing to do with the criminal prosecution, one was, where the accused was charged with a breach of the duty of allegiance, as in cases of treason; and the other was, *where the government purposes to punish offences committed by its own citizens, beyond the territorial limits of the state*, almost exactly defining and deciding, in my judgment, the question in the case now under consideration. The same doctrine is recognized in Massachusetts, as well as in this state. (2 *Mass. R.* 132, 134; 13 *Mass.* 4,) and also in Pennsylvania, (5 *Bin.* 617.)

Thus it will be seen, that the several cases above referred to, uniformly agree, that the several offences considered in them were committed *in this state*, and that therefore, our courts had jurisdiction over them, and over the persons committing them, when found within the state; and that they all admit, that the courts could have had no jurisdiction, if those offences had been perpetrated without the limits of the state. "The different states," it has been truly remarked, by an eminent judge, "are altogether as independent of " each other, in point of jurisdic-

The People v. Merrill.

tion, as any two nations," and an offence committed in one state, can not be tried in another.

The precedents and authorities in England, cited by the counsel for the prosecution, all grew out of special statutes of that realm. As has been already remarked, by the common law, offences were local, and could only be tried in the county where committed. (*See 1 Ch. Crim. Law*, 150, 177, 179.) The several acts of parliament are there cited and commented upon which provide for the trial in one county of certain offences committed in another. Under the statute of 33 Henry VIII, c. 23, arose the case of *Ney* agt. *Sawyer*, (61 c. *L. R.* 100,) cited by the counsel on both sides, on the argument of this demurrer; it was held in that case that a British subject was triable in that country for the murder of another British subject, committed on land within the territory of a foreign independent kingdom. The argument in that case, in support of the jurisdiction was the same that is urged here; that there is a mutual contract between the government and its citizens; that the citizen is bound to yield obedience to the laws, and that the government is bound to protect the citizen, and the additional argument in the case in England, was derived from the preamble of the act of Henry VIII, that persons guilty of murder or manslaughter, committed out of the realm, and not upon the high seas, might, without the remedy afforded by the act, escape punishment. It is to be observed, in passing, that the statute under which this conviction was had, was repealed by that of 9 Geo. IV, c. 31, and other provisions instituted in its stead. The counsel for the people in this case, while he admits that a similar jurisdiction to that which he claims here, was derived in England by special statute, contends that our statute is sufficiently broad to sustain the counts demurred to.

I have already intimated that every statute is presumed to be enacted with reference to the local jurisdiction of the legislature of each state. The section is very general.

"*Every person who shall sell or in any manner transfer the services of any black, who shall have been forcibly taken, in-*

The People v. Merrill.

veigled or kidnapped from this state to any other state, place or country, shall, upon conviction, be punished." It does not confine the offence to persons who shall be residents of the state at the time of the perpetration of it, nor does it confine its commission against citizens of the state alone, for the protection of which it is supposed to be intended to provide. The phraseology, however, is like that of most, if not all the other sections and statutes in relation to crimes and misdemeanors. For instance, the 29th section of the act, (2 R. S. 664,) to punish for *mayhem*, uses the same general language, when it declares that *every person*, who from premeditated design, shall cut off or disable any limb or member, shall, upon conviction, be punished by imprisonment in a state prison; and so the statutes respecting murder and manslaughter, and the accessories thereto, are equally general in their phraseology. Yet no one can contend that a citizen of this state, who is guilty of the murder of another citizen in the state of New Jersey, can be tried for that crime in this state. The district attorney has indeed put forth the averment, that if an *alien* should be guilty of mayhem upon a citizen of the state, beyond its territorial limits, and the courts had obtained jurisdiction of his person, by his voluntarily coming within the state, he could be tried and punished; but the authority which he cites (*Story's Conflict of Laws*, § 5, p. 625, 626) does not support his position. Story remarks, in a note to one of the sections quoted, that "the more common usage in modern times is to remand the criminal to the country or state where the crime was committed, the practice of most countries being to surrender up fugitives from justice, who escape into their territories, and seek an asylum from punishment." It may, therefore, be argued that the section is to be limited in its application to a sale within the state, and the description "who shall have been forcibly taken," &c., is referable to the time of indictment and trial, and not to the time of sale; and that the offence probably aimed at by the legislature, was a sale within the state, with intent forcibly to remove; and it might refer to removing and selling afterwards.

The People *v.* Merrill.

At all events, whatever may have been the doctrine in England, under their special statutes, our courts are governed by the common law in our own state, and by comparing all those statutes together, it is evident that their jurisdiction is limited to offences within the state; (2 *R. S.*, 4th ed., p. 881; 1 *Kent Com.*, note *R*) and the cases cited and commented on above, show what offences shall be considered as having been committed in the state, and do not include the one embraced in the counts demurred to in this case.

It is argued that there is an obvious necessity for the power of the state to pass the section which it is insisted supports these counts. That the state can not protect its citizens without it; that the state must have such power and right. To this, it may be answered:

First. That this state, as a sovereign and independent member of the confederacy, can not protect its citizens beyond its own territorial limits.

Suppose a citizen is imprisoned in Europe, or in Cuba, to whom is he to apply for protection? Undoubtedly to the general government. The right to arrest and try offences out of the state, is founded upon its duty and power to protect; and it can not protect beyond its boundaries. The doctrine, therefore, can hardly be said to apply to the individual states, but to the government of the union. If an individual passes the boundaries of his own state, and enters another, he retains his rights and high character as an American citizen, but he subjects himself, at the same time, to the laws of the state to which he removes or in which he abides. The great inquiry when the general government interferes in behalf of this citizen, is whether his personal rights have been violated, and whether he has or not, committed an offence against the laws of the government which is assuming to punish him. If he has, he is left subject to the laws, and can obtain no further redress.

Again, this argument may be answered, secondly, by remarking that the section is general, and not confined to the punishment of or protection of residents within the state. It embraces *every person* who shall sell any black, who may have been

The People v. Merrill.

forcibly taken or inveigled from the state, by another, without the knowledge of the seller, who may be doing an act entirely consistent with and in obedience to the laws of the state in which he makes the sale. This could never be tolerated, and was never intended. The conclusion is this, that the legislature intended to provide against kidnapping; that they created an offence cognizable by the laws, when they enacted the 31st section, declaring that if any person should inveigle a person of color out of the *state* with *intent* to sell and dispose of him as a slave, it should be a felony. The actual sale, or attempt to sell, out of the state, would undoubtedly be evidence of the felonious intent, and would in all courts be so received; conviction would probably follow, and the whole object of the statute be fully answered by the infliction of deserved punishment upon the culprit.

Second. But whatever construction we give to this statute, and if it is indeed to be considered as broad and comprehensive in its terms, as is contended for by the counsel for the people, it is then, in my judgment, repugnant to the constitution of the United States. The 6th article of the amendments to that instrument, declares that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury, *of the state and district wherein the crime shall have been committed.*

The penal acts of one state can have no operation in another state. The courts of this state, have no power to enforce here the criminal laws of another state. Here, laws are local, and affect nothing more than they can reach. (*Story's Conflict of Laws*, 516, 517; *Sears*, 619, 620, 621; 14 *J. R.* 338, 340; *Taylor N. C. R.* 65.)

It is also not in accordance with the 2d section of the 4th article of the same constitution. That declares that the citizens of each shall be entitled to all the immunities of the citizens in the several states, and provides that a person charged in any state with treason or felony or other crime, who shall flee from justice, or shall be found in another state, shall, on demand of the executive authority of the state from which he fled, be de-

The People v. Merrill.

livered up to be removed to the state having jurisdiction of the crime. The third and fourth counts of the indictment charge substantially that Northup, on the 10th day of March, 1841, was a free negro, and inhabitant of the state of New York; that he was on that day, unlawfully and feloniously, and without lawful authority, inveigled from this state to the city of Washington, in the District of Columbia, by the defendants, and that they, on the first day of January, 1853, at the city of Washington, unlawfully and feloniously sold him as a slave. Now the act of selling was a lawful one in the District of Columbia, for congress, though often invoked so to do, have not assumed to prohibit the sale of slaves in that district. The defendants therefore had the right to sell, by the laws of the district, and for that act alone were not punishable there. Suppose any other person, who had not participated at all in enticing Northup from this state, had found him at Washington, and claimed and sold him there, could he have been indicted and tried here, if caught, for such sale? Undoubtedly not. And yet the section, if the construction is given to it which is contended for here, includes just such a case. Could such a person when indicted, have been demanded here as a fugitive from justice, under the 2d subdivision of article four? There is but one reply, it appears to me, that can properly be given to these questions. It is no answer to say that the persons selling were guilty of inveigling or kidnapping; that is another distinct offence, and is provided for by the 30th section.

The inveigling with *intent* to sell there constitutes the crime, and is properly and clearly punishable as already shown. It is the sale alone, for which the defendants are indicted, under the counts we are now considering, and that sale in a district where it was perfectly lawful.

It can not be said that the constitution of the United States is not operative upon a case of this character. It is the supreme law of the land, and binding upon all states and upon all state courts. It is insisted that the state is an independent sovereignty in every thing except what is granted to the United States by the articles of confederation, and provided for by the

The People v. Merrill.

constitution. This may be conceded, and yet that instrument may be binding in this particular case; our statute coming in conflict with two of its particular provisions. The constitution was intended to be binding, as it regards the rights of the citizens of the several states, upon the people of the whole union. It was never intended that a legislature should violate state comity, or national rights, as the section in question does, by assuming to punish as a felony, a sale of property in a state or district where the right exists, by the laws of the locality, to make such sale; and when the seller may have no knowledge whatever of the forcible abduction from the state which claims to punish him.

It can not be seriously, at all events, contended, in my judgment, that one selling a slave in a foreign state, where it is lawful, can be held criminally responsible for the act of another, in removing such slave from the state without any knowledge of such removal. "Every man shall answer for his own sins," is a correct maxim in morals, as well as law, and no legislative body possesses the power, in my judgment, to alter it.

I am happy, in thus feeling myself required to come to the conclusion that the judgment in this case must be affirmed, that the defendants, if guilty, are not to escape trial and conviction. The 30th section makes ample provision, within constitutional limits, for their punishment, and if convicted, under the first count, which is framed under that section, the whole object of the law will be answered, state sovereignty will be maintained, the rights of the citizens protected, and no principle will be violated.

No state can ask more than this, and no wise legislature will ever be disposed to grant it.

Judgment of the Oyer and Terminer should be affirmed.

COURT OF APPEALS. Albany, March, 1854. Before *Gardiner*, chief judge, and *Johnson, Denio, Ruggles, Edwards, Parker, W. F. Allen* and *Selden*, Judges.

WILLIAM DARRY pl'ff in error vs. THE PEOPLE def'ts in error.

The second subdivision of section 5 title 1, chap. 1, part 4 of the Revised Statutes (2 R. S. 657) which declares the killing of a human being to be murder, &c. "when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any individual" does not embrace the case of killing by an unprovoked and cruel beating, where there was no intention to take life.

The language of that subdivision is not applicable to the case of homicide resulting from a direct assault by one person upon another. (a)

The *dicta* in *The People v. Enoch* (13 Wend. R. 159) *The People v. Rector* (19 Wend. R. 569) and *The People v. White*, (24 Wend. R. 520) by which a contrary opinion was expressed, disapproved.

The plaintiff in error was convicted of the murder of his wife at the court of Oyer and Terminer for the county of Erie, on the 15th day of December, 1852. A bill of exceptions was taken on the trial, and the presiding judge of the Oyer and Terminer having made a certificate of probable cause, the proceedings were removed into the Supreme Court by *certiorari*, where judgment was rendered in favor of the people, and the prisoner was sentenced to be executed. The governor having respited the sentence a writ of error was brought to this court.

The indictment charged the killing to have been effected by the defendant by striking and beating the deceased with his hands and feet and with a chair, and by kicking her. There were five counts. The first two charged the murder to have been committed with malice aforethought, according to the common law form; the others alleged that it was done with a premeditated design to effect the death of the deceased.

(a) This cause was decided after a reargument. It had been argued in the Court of Appeals in 1853, when the members of the court were equally divided in opinion.

Darry v. The People.

On the trial the district attorney gave evidence tending to prove that the deceased died of injuries and bruises inflicted upon her by the prisoner on the 8th, 9th and 10th days of August, 1852, the death taking place on the 14th of that month. It also appeared in evidence that the prisoner, a portion of the time during which the injuries were inflicted, was under the influence of liquor in some degree; and no evidence was given to show any provocation on the part of the deceased, but the evidence tended to show that she gave no provocation and made little or no resistance to the attack of the prisoner, save in the way of expostulation and request for him to desist. It was shown that the prisoner had several times threatened to kill his wife, and that they were alone together in the room of a house occupied by them when the injuries were inflicted, the other part of the house being occupied by her parents and brother, who heard her cries and witnessed many of the acts of violence. The dying declarations of the deceased were given in evidence by the prosecution, to the effect that on the 8th of August, after she and the prisoner had retired to bed, he commenced striking her in the pit of the stomach with his fist, and that he repeated it on the two following nights; and that he struck her upon the head with his fists, and on one of these nights with a chair. A surgeon who had examined the body, testified, that in his opinion her death was caused by the blows upon her stomach, but that those on her head were not mortal.

The prisoner's counsel maintained that the evidence did not prove a premeditated design on the part of the prisoner to effect the death of the deceased, and that he was not guilty of murder.

The presiding judge among other things charged the jury that in order to convict the prisoner of the crime of murder, it was not necessary that they should be satisfied that the prisoner at the time of inflicting the injuries upon the deceased entertained a premeditated design to effect her death by means of those injuries, according to the first subdivision of section five of the title of the Revised Statutes respecting crimes punishable with death; but that if they should find upon the evidence

Darry v. The People.

that the prisoner designedly inflicted the injuries, that they were inflicted without provocation and not in the heat of passion, but were perpetrated by such acts as were imminently dangerous to the life of the deceased, and evincing on the part of the prisoner a depraved mind, regardless of human life; although without any premeditated design to effect the death of the deceased, that then the offence would come within the statute defining the crime of murder. The counsel for the prisoner excepted to this part of the charge.

Nicholas Hill Jr. for plaintiff in error.

I. By the ancient common law the distinction between *murder* and *manslaughter* was mainly nominal, both being punishable with death. At a later period the terms denoted an absurd discrimination in favor of such as could read the *neck-verse*; but they were finally used to describe different grades of criminal homicide depending on the *actual intent or design*. (*Foster's Cr. Law*, 302 to 306, ed. 1791; *Sir J. Kenlynge's R.* 121 to 127; 4 *Reeves' Hist. Eng. Law*, 393, 534 to 536.)

II. When the common law first professed to apportion punishment according to the degree of actual guilt, the word *manslaughter* embraced all cases of homicide, and the only term descriptive of that species punishable with death was *malice prepense* — denoting deliberate acts of killing, in contradistinction to others. (5 *Reeves' Hist. Eng. Law*, 220 to 223; *Pulton de Pace Regis*, 117, ed. 1615; *Lambard's Eirenarcha*, 232, ed. 1619, n 39.)

III. After the inferior grades of homicide came to be known exclusively as *manslaughter*, much confusion arose from attempting to describe and classify cases of *murder* by the additional terms *express* and *implied* malice; they being often used to indicate *different degrees of actual guilt*, thus obscuring the distinction between the two offences. (See 15 *Viner's Abr. "Murder," E pl. 4*; 13 *Wend.* 163-4, per *Nelson, C. J.*; 3 *R. S.* 808-9, notes 2d ed.)

1. The term *express* malice originally meant malice proved

Darry v. The People.

independently of the *mere act* from which death resulted, and implied malice the reverse. (6 *Howell's St. Tr.* 547, *per Hyde, J.*; *Lamb. Eirenarcha*, 205, ed. 1619, 239, 241; 2 *Gilb. Ev.* 879, *Lofft's ed.*, 1791; *Law Grammar*, 438, *Dub. ed.* 1791; *Best's Pr. of Ev.* 344, § 306; 1 *East's P. C.* 224; 9 *Metc. R.* 93, 102-3, *Yorke's case*; *Savill's R.* 67-8, *Anonymous*; See 9 *Coke's R.* 67, *Machally's case.*)

2. They therefore described only different *modes of proving* actual guilt, not different *degrees* of it; and they belonged to the *law of evidence*, not to a *definition of homicide*. (4 *Black. Com.* 198 to 200; 3 *Coke's Inst.* 47, 51-2; 2 *Gilb. Ev.* 879, 880, *Lofft's ed.* 1791; 6 *Howell's St. Tr.* 547, *Hyde, J.*; *Law Grammar*, 438, *Dub. ed.* 1791; 1 *East's P. C.* 224; *Lamb. Eirenarcha*, 205, ed. 1619, 239; *Best's Principles of Ev.* 344, § 306; *Savill's R.* 67-8, *Anonymous*; 9 *Coke's R.* 67, *Machally's case*; *Webster's trial, Bemis*, 466-7.)

(1) They did not even indicate different degrees of *evidence*, both kinds, when sufficient, being conclusive until overcome. (*Lamb. Eirenarcha*, 205, ed. 1619; 1 *Brown's R. Appendix*, 22-3; *Best's Principles of Ev.* 344, § 306; 2 *Gilb. Ev.* 879, 880, *Lofft's ed.* 1791; 9 *Metc. R.* 93, *Yorke's case*; 6 *Peter's R.* 632, *per Story J.*; 1 *Phill. & Amos on Ev.* 460.)

(2) And they were applicable to every case where proof of the *actual intent* was requisite to characterize an offence, whether *trespass, larceny* or *murder*. (*Whart. Amer. Cr. Law*, 232; *Barb. Cr. Law*, 383, 2d ed.)

3. When they ceased to indicate mere rules of evidence, each of them was applied in *various* and often *contradictory* senses, so that they became *useless* not only, but *mischievous*. (15 *Viner's Abr. E. Pl.* 2, 4; 2 *Ld. Raym.* 1488-9, 1499; *Lamb. Eirenarcha*, 205, ed. 1619; 4 *Bl. Com.* 198 to 200; 3 *Croke's R.* 131, *Halloway's case*; 13 *Wend.* 163-4, *per Nelson J.*; 24 *Wend.* 557-8, *per Furman, Senator*; 1 *Hale's P. C.* 451, 455; 1 *East's P. C.* 214, 222, 224.)

IV. Again, though the common law professed to apportion punishment on ethical grounds, it disregarded the indelible dis-

Darry v. The People.

inction between *intentional* and *constructive* murder, punishing every species of the latter indiscriminately with death, like the former. (1 *East's P. C.* 255-6 § 31-2; 13 *Wend. R.* 174-5, *Walworth, Ch.*; 1 *Ashm. R.* 298-9, *Greene's case*; 1 *Browne's R. Appendix*, 22-3; 19 *Wend. R.* 592-3, *Cowen J.*)

1. In cases of *constructive* murder, the common law, out of respect to its own theory of punishment, *imputed* a murderous intent, contrary to the *known fact*, on the principles of *artificial* presumption. (*Dalt. Just.* 472, 347, *ed.* 1705; 1 *East's P. C.* 255-6, § 31-2; 13 *Wend.* 174-5, *Walworth Ch.*; See *Best's Principles of Ev.* 345, § 307; 9 *Metc. R.* 117, 118, 129, 130; *Trials per Pais*, 607.)

2. Where a murderous intent was *presumed* from an *unexplained act* of killing, the presumption was a *natural* one, and never indulged contrary to the fact. (1 *East's P. C.* 223, § 10; *id.* 225, § 13; *id.* 255-6, § 31-2; 2 *Gilb. Ev.* 880-1, *Lofft's ed.* 1791; 8 *Carr & Payn*, 425, *Marriott's case*; 9 *Metc. R.* 93, *Yorke's case*; 4 *Dall. R.* 146, *McKean C. J.*; *Best's Principles of Ev.* 344, § 306; 6 *Peters' R.* 632, *per Story, J.*; 1 *Phill. & Amos on Ev.* 460; See 24 *Wend.* 583, *Wager, Senator*; *Point III*, and its subdivisions.)

V. Again, the common law, while boasting its abhorrence of all power not expressly limited, especially in criminal cases, left the *degree* of moral guilt essential to *constructive* murder entirely undefined, so that the most learned judges did not know what it was. (See *Dwarr. on Stat.* 437, 1st *ed.*; 1 *Bl. Com.* 440 to 442; 1 *Chitty's Black.* 315-16; 7 *Ser. & Rawle*, 437-8, *Gable's case.*)

1. Sometimes to constitute *constructive* murder, an intent to *frighten* was enough; at others an intent to *trespass*; at others a *criminal* intent was requisite; and at others a *felonious* one. (3 *Coke's Inst.* 56-7; *Dalt. Just.* 472; *Sir J. Kelynge's R.* 127, 129-30; 2 *Stark's Ev.* 516, 517 *note (o) ed.* 1837; 1 *East's P. C.* 255 to 271; See 13 *Wend. R.* 163-4, 173 to 176.)

2. The question whether the accused should suffer death, therefore, depended on the policy of the times, and the temper and discretion of different judges; so that *Jeffreys* might apply

Darry v. The People.

one rule and *Hale* another. (See *Beccaria on Cr.* 163; 1 *Day's R.* 81 note, *Ld. Camden*; 1 *Bl. Comm.* 440 to 442; 1 *Chitty's Blackst.* 315, 316; 7 *Ser. & Rawle*, 437-8, *Gable's case.*)

3. In cases of this class, moreover, where death resulted from an act committed under *provocation*, the life of the accused often depended on artificial rules prescribing what may *legally* excite anger, and when passion *shall* subside. (1 *East's P. C.* 232, 234-5; 1 *Browne's R. Appendix*, 20; 12 *Coke's R.* 87; 2 *Croke's R.* 296; 8 *Carr. & Payne*, 182, *Fisher's case.*)

VI. The legislation of Pennsylvania in 1794, to remedy these defects in the common law, divided all murder recognized by it into two classes, viz., murder in the *first* and *second* degrees, declaring the former punishable by *death*, and the latter by *imprisonment*. (*Whart. Amer. Cr. Law*, 355, 2d ed; 7 *Ser. & Rawle's R.* 424; 1 *Ashm. R.* 298-9; See 3 *R. S.* 809, notes, 2d ed.)

1. The practical effect of this statute was to abolish capital punishment in all cases of *constructive* murder, except where the actual design was to perpetrate *arson, rape, robbery or burglary*. (*Whart. Amer. Cr. Law*, 355, 420, et seq.)

2. It also made every case of alleged murder, punishable capitally, depend on *known and fixed grades of actual guilt*. (*Whart. Amer. Cr. Law*, 420, et seq.)

3. In all case of *constructive* murder, therefore, if the actual design was to perpetrate one of the specified crimes, it was murder in the *first* degree, but otherwise in the *second*. (See 1 *East's P. C.* 255; *Whart. Amer. Cr. Law*, 420-1, 428, 430-1; 1 *Brown's R. Appendix*, 21-2; 1 *Ashm. R.* 298-9.)

4. In all cases of alleged *intentional* murder, there could be no conviction of murder in the *first* degree, unless the killing was perpetrated from an actual *deadly design*. (See 1 *East's P. C.* 255; *Whart. Amer. Cr. Law*, 420, et seq.; 1 *Browne's R. Appendix*, p. 21-2; 1 *Ashm. R.* 298-9, *Greene's case.*)

5. If the design, therefore, was to do bodily harm, or other injury, however great, but not to *destroy life*, nor to commit one of the *specified crimes*, the offence was murder in the *second degree*. (*Whart. Amer. Cr. Law*, 420-1, 430-1; 1

Darry v. The People.

Browne's R. Appendix, p. 22; 1 *Ashm. R.* 298-9; See 1 *East's P. C.* 255.)

6. And if the act was not deliberate, but done in the *heat of passion*, i. e. upon sudden and sufficient provocation, it was *manslaughter*, even though *voluntary*, being so at common law. (7 *Ser. & Rawle*, 423, 428, 435, *Gable's case*; 1 *East's P. C.* 234; 4 *Bl. Comm.* 190 to 192; *Whart. Amer. Cr. Law*, 426-7; 8 *Law Reporter*, 542, *Varney's case*; 1 *Browne's R. Appendix*, pp. 23 to 25.)

VII. Our law as to criminal homicide was intended to embody the policy thus adopted in Pennsylvania, and its different sections and their subdivisions should be construed so as to remedy the same evils, and affect the same general objects, if possible. (3 *Coke's R.* 7 *Heyden's case*; 3 *R. S.* 808-9, *notes*, 2d ed.)

1. There is affirmative evidence that both these statutes were aimed alike at the following objects:

(1) To make punishment *certain*, rather than *severe*, so as to render it *preventive* rather than *vindictive*. (See 4 *Bl. Comm.* 9 to 19, 202; *Whart. Amer. Cr. Law*, 355; 3 *R. S.* 807-8, 811, *notes*, 2d ed.)

(2) To make every case of murder, punishable capitally, depend on *known and fixed degrees of actual guilt*. (See *Point V*, *subd's* 1, 2, 3; *Point VI*, *subd.* 1, *et seq.*; 3 *R. S.* 812, *notes*, 2d ed.)

(3) To make every case of *constructive* murder, thus punishable, depend on whether the actual intent was to commit a *felony*. (See *Point VII*, and *its subd's*; 1 *East's P. C.* 255; 2 *R. S.* 657, § 5; *id.* 661, § 6, 10 to 12; 13 *Wend.* 159, *Enoch's case*; 19 *Wend.* 592, *Rector's case*; 3 *R. S.* 308-9, 812, 813, *notes*, 2d ed; *Whart. Amer. Cr. Law*, 420-1, 430-1; 1 *Browne's R. Appendix*, 21-2.)

(4) To make every *other* case of alleged murder, thus punishable, depend on whether the actual intent was *to effect death*. (See *Point VI*, and *its subd's*; *Whart. Amer. Cr. Law*, 420-1; 3 *R. S.* 812, *note to* § 10.)

(5) To make the distinction between murder and manslaughter

Darry v. The People.

clear, so that the offences should not be confounded. (3 R. S. 808-9, notes; See 1 East. P. C. 214, 222.)

2. The difference between the statute of Pennsylvania and our own will be found mainly *nominal*, and to consist in the following particulars:

(1) The offences called murder in the *second* degree by the former, are called *manslaughter* in the *first* degree by ours. (See Point VI, subd. 4; Whart. Amer. Cr. Law, 420-1, 430-1; 1 Browne's R. Appendix, p. 22; 2 R. S. 161, § 6, 7, 8; 3 R. S. 812-13, notes, 2d ed.; 19 Wend. 592-3, Rector's case; 13 Wend. 159, Enoch's case; 24 Wend. 584-5, White's case.)

(2) The offence called *voluntary manslaughter* by the former, is either manslaughter in the *second*, *third* or *fourth* degree under ours. (Whart. Amer. Cr. Law, 355-6; 7 Ser. & Rawle, 423, 428, 434, Gable's case; 1 East's P. C. 234, § 20; 8 Carr. & Payne, 182, Fisher's case; 4 Bl. Comm. 100 to 192; 2 R. 661, § 10, 12, 19.)

(3) The offence of *involuntary manslaughter* was only punishable by the former as a *misdemeanor*; whereas it may be manslaughter in the *third* or *fourth* degree, under ours. (7 Ser. & Rawle, 424-5, 428, Gable's case; 2 R. S. 661-2, § 13, 19.)

(4) The former described the degree of guilt essential to *constructive* murder, punishable with death, by *naming particular crimes*; while ours does so by the term *felony*. (Whart. Amer. Cr. Law, 255; 2 R. S. 657, § 5, subd. 3; 19 Wend. 592-3, Rector's case; 13 Wend. R. 159, Enoch's case.)

(5) The former described *intentional* murder without discriminating between cases of *particular* and *general* malice; but ours follows Mr. East in this respect. (Whart. Amer. Cr. Law, 355, 435-6; 1 East's P. C. 223, § 10, 214; 2 R. S. 656-7, § 4, 5, subd. 1, 2.)

VIII. The terms used in describing cases of criminal homicide by our statute, are to be so construed that every section and subdivision shall, if possible, embrace a *peculiar class*, easily distinguishable from others; this having been the *object* of classifying them. (3 R. S. 808-9. 811, notes, 2d ed.; 3 Coke's R. 7 Heyden's case.)

Darry v. The People.

1. The clauses describing murder and manslaughter are therefore to be compared, and an efficient and consistent operation given to each, if possible. (*Dwarr. on Stat.* 699, 700, 1st ed.; *Broom's Leg. Max.* 247, 249, 2d ed.; *Bac. Abr.* "Statute" (I,) pl. 2.)

2. Each clause is to be applied so as to embrace *all* the cases which it describes, and *exclude* all other cases. (*Cowen & Hill's notes*, 1382-3; 6 *Shepl. R.* 308, 313, *Jones v. Jones*; 4 *Hill's* 384, *Purdy v. The People.*)

3. And no separate description is to be applied to more than *one class of cases*, or extended so as to render other clauses *superfluous* or *inoperative*. (*Leiber's Pol. & Leg. Herm.* 86 to 88; *Coke on Legisl. Express.* 42; *Broom's Leg. Maxims*, 246-7; *Bac. Abr.* "Statute" (I,) pl. 2.)

IX. The *second* subdivision of the statute definition of murder, like the first, embraces only cases where there is proof of an intent to *destroy life*, and not cases of mere *constructive* murder. (2 *R. S.* 657, § 5, *subd.* 1, 2.)

1. This is plain from the terms employed in characterizing the act called for by it. (2 *R. S.* 657, § 5, *subd.* 2.)

(1) It must be a *voluntary* act resulting in death; *i. e.* not negligent nor accidental, but *willful*. (9 *Metc. R.* 102-3, *Yorke's case*; 1 *East's P. C.* 231, § 18; 8 *Carr. & Poyne*, 425, *Marriatt's case.*)

(2) It must be in its nature *dangerous to others*; *i. e.* menacing not merely *property*, but *life*. (See 2 *R. S.* 661, § 4, 12; *Crabb's Synon.* 171, "Danger," ed. 1847.)

(3) It must, moreover, be *imminently* dangerous, *i. e.* most so; the danger not being *remote*, but *present* and *impending*. (*Crabb's Synon.* 405, "Imminent;" *Rich. Dict.* "Imminent.")

(4) It must *evince* a depraved mind, &c.; *i. e.*, the act itself must *prove* this beyond a doubt. (*Crabb's Synon.* 77, *Evince*; *Rich. Dict.* "Evince" and "Evict.")

(5) And it must also prove a mind *regardless of human life*; *i. e.*, not mere cruelty or ferocity of temper, but *unprovoked*, *deadly depravity*. (See *R. S.* 812, *notes*, 2d ed.; 3 *R. S.* 808, § 5, *subd.* 4; *Whart. Amer. Cr. Law*, 435-6.)

2. An act corresponding with these descriptive particulars, and entirely *unexplained*, if aimed at a *specific person*, is always conclusive evidence of *intentional murder*. (See 9 *Metc. R.* 93, *Yorke's case*; *point III, subd. 2, (1.)*)

(1) It proves murder from *express malice* according to most of the modern authorities, and from *implied malice* according to others. (*Viner's Abr. "Murder," E. pl. 2, 4; 2 Ld. Raym. R. 1488-9, 1499; 1 East's P. C. 222-3, 231; Lamb. Eirenarcha. 205; id. 1619; see point III, and cases cited.*)

(2) It makes a case where proof of deadly malice beyond the *act itself* is superfluous, if not irrelevant. (*Best's Principles of Ev. 344, § 306; 1 Browne's R., Appendix, 22-3; 9 Metc. R. 93, Yorke's case; see point IV, subd. 2, and cases cited.*)

3. Whether the act is aimed at a *specific life*, or human life *indiscriminately*, makes no difference in this respect; it being conclusive evidence of a *deadly intent* in both cases, until explained. (1 *East's P. C. 231, § 18; Whart. Amer. Cr. Law, 435-6.*)

X. The first and second subdivisions, therefore, do not describe different *grades* of actual guilt, but only different *manifestations* of it; classifying cases of intentional murder, as Mr. East did, by the apparent *aim* or *direction* of the overt act. (2 *R. S. 656-7, § 4, 5; 1 East's P. C. 222-3, § 9 to 12; 1 id. 227, 229-30, § 14, 15, 17, 18.*)

1. The terms of the *first* subdivision embrace all overt acts which *single out their object*, and assume at the time the form of *particular* or *individual* hostility. (2 *R. S. 657, § 5, subd. 1, 2; 1 East's P. C. 223, 230.*)

(1) The words "the *person killed*," either describe *particular* malice, or they are *superfluous*; and the latter is not to be supposed. (2 *R. S. 657, § 5, subd. 1; see 24 Wend. 520, White's case; Bac. Abr. "Statute" (I), pl. 2; Broom's Leg. Max. 246-7.*)

(2) And the words "or of any human being," describe cases of a *like kind*, and no others. (1 *East's P. C. 223, 230, § 10, 17; 2 Moore's R. 491, Clark v. Gascarth; 8 Taunt. R. 431, S. C.; 4 Durnf. & E. 224, 226-7; Evans v. Stevens; 5 Barn. & Ald.*

Darry v. The People.

164, *Phillips v. Barber*; *Broom's Leg. Max.* 294; 1 *Comst. R.* 47, 63-4, 69.)

(3) All such cases *may* and therefore *must* be tried under this subdivision, whether the malice be *express* or *implied*. (See point VIII, subd. 1, 2, 3; point III, and its subd.; 4 *Bl. Comm.* 200; 3 *Coke's Inst.* 51-2; *Lamb. Eirenarcha*, 205, ed. 1619; 2 *Ld. Raym. R.* 1488-9, *Oneby's case*; 3 *Croke's R.* 131, *Halloway's case*; 8 *Carr & Payne's R.* 425, *Marriott's case*; 1 *Carr & Marshm.* 164, *Waller's case*; 9 *Metc. R.* 93, *Yorke's case*.)

(4) So though *general* malice is proved, if the *overt act* was aimed only at a particular person; as where one resolves to kill the first man he meets, and does so. (4 *Bl. Comm.* 200; 2 *Ld. Raym.* 1489, *Oneby's case*; see *Broom's Leg. Max.* 226; *Whart. Amer. Cr. Law*, 435-6.)

(5) And so, whether the design to kill the person was formed *at the moment*, or existed a *year* before the murder. (*Whart. Amer. Cr. Law*, 433; 1 *N. Y. Leg. Obser.* 4, 19, *Clark's case*; 12 *Ohio R.* 43, *Shoemaker's case*; 9 *Metc. R.* 103, *Yorke's case*.)

2. The terms of the *second* subdivision do not describe acts aimed at a *particular person* and menacing *no one else*. (2 *R. S.* 657, § 5, subd. 2.)

(1) The act having resulted *fatally*, the inquiry whether it was in fact *dangerous* to the deceased, would be absurd.

(2) And the words "any *particular individual*," would be clearly inoperative. (2 *R. S.* 657, § 5, subd. 2.)

(3) Indeed nearly one-third of the words are mere surplusage if acts aimed at *individual life* were intended. (2 *R. S.* 657, § 5, subd. 2.)

3. This subdivision, therefore, calls for acts not aimed at any *particular life*, but at "human life" *indiscriminately*; such as poisoning a public well, shooting at random into a crowd, &c. (2 *R. S.* 656-7, § 4, 5, subd. 2; 1 *East's P. C.* 223, 231.)

(1) Such acts never evince *less* atrocity than those which discriminate their object, but generally *more*. (*Whart. Amer. Cr. Law*, 435-6; see point IX, subd. 1, 2, 3.)

(2) As they involve no "design to effect the death of any

particular individul," however, that specific test is dispensed with. (2 R. S. 657, § 5, *subd.* 2.)

4. This mode of describing *intentional* murder, though less general than that of the Pennsylvania statute, indicates no departure from its *policy*, but only a preference for the *later* and more *certain* mode adopted by Mr. East. (See *Whart. Amer. Cr. Law*, 355, 435-6; 1 *East's P. C.* 214, 222, § 1, 9; 3 R. S. 809, *notes*, 2d ed.; see *points VI and VII*.)

XI. The limitation of the first and second subdivisions to cases of *intentional* murder is obviously necessary to reconcile them with the subsequent provisions relating to *constructive* murder at common law. (See *point VIII, subd.* 1, 2, 3.)

1. The latter is declared murder when the intent is *felonious*, though perpetrated without *any* deadly design, *i. e.* either *particular* or *general*. (2 R. S. 657, § 5, *subd.* 3.)

2. If the intent was *not* felonious, but to commit a *misde meanor*, *e. g.* an assault and battery, the killing is declared manslaughter. (2 R. S. 661, § 6; *Whart. Am. Cr. Law*, 431; 1 *Asm. R.* 298-9, *Green's case*; see 13 *Wend.* 159, *Enoch's case*.)

3. These provisions embrace in terms *all* constructive murder known to the common law, and none can be *excepted* without altering the language. (1 *East's P. C.* 255-6, § 31-2; 1 *Sumn. R.* 386-7, *per Story, J.*; 2 *Hill's R.* 35-6, *per Bronson, J.*; 9 *Wheat.* 188, *Gibbons v. Ogden*; 20 *Wend. R.* 561-2, *Bronson, J.*; see *point VIII, subd.* 2.)

XII. Where the act of killing, as in the present case, neither menaced nor endangered any one but *the person killed*, the test prescribed by the second subdivision is too loose and indefinite to be safely applied. (2 R. S. 657, § 5 *subd.* 2.)

1. The clause obviously contemplates that the jury are to judge in view of *the act alone*, without regard to the *event*. (See *point X, subd.* 2, (1).)

2. If the act is *prima facie* evidence of an intent to kill a specific person, there is no reason why the case should not be tested by the first subdivision. (See *point IX, subd.* 1, 2; *point X, subd.* 1.)

Darry v. The People.

3. But if it shows no intent to kill, a verdict finding that it was so *imminently dangerous as to evince a mind regardless of human life*, must necessarily be based on something beside evidence. (2 R. S. 657, § 5.)

4. The test is manifestly intelligible and appropriate where the act is not aimed at a *particular life*, but at human life *indiscriminately*, and there no other can be applied. (See point X, subd. 2, 3.)

XIII. The above interpretation gives an efficient and consistent operation to all the different clauses relating to criminal homicide according to the natural and most obvious meaning of their terms, and makes our law *substantially* like that of Pennsylvania, as the legislature intended. (2 R. S. 809, notes, 2d ed.; see points VI and VII; point VIII, subd. 1, and cases cited; point XI, and cases cited.)

1. It abolishes capital punishment in all cases of *unintentional* killing, except where the actual design was to commit a *felony*. (See point VI, subd. 1; point VII, subd. 1, (3.)

2. It makes all cases involving capital punishment depend upon known and fixed grades of *actual guilt*. (See points IV and V; point VI, subd. 2; point VII, subd. 1, (2.)

3. It assumes that the object of classifying the cases was to subject each kind to a test *appropriate* and *peculiar* to itself. (See points VIII and XII, *supra*.)

4. And it marks the distinction between *murder* and *manslaughter*, so that they can not often be confounded. (See point III, *supra*; point VII, subd. 1, (5.)

XIV. This construction, moreover, is directly sustained by the historical evidence of the intent of the legislature, which shows affirmatively the following facts, among others:

1. The revisers drew the different clauses to remedy the same evils aimed at by the Pennsylvania act. (See 3 R. S. 808-9, notes, 2d ed.; see point VI and VII, *supra*.)

2. They recommended the adoption of the principle that a *design to kill* should mark *every case* of murder other than *constructive*. (3 R. S. 812-13, notes, 2d ed.)

3. They nevertheless proposed for consideration a section

Darry v. The People.

declaring *unintentional* killing to be *murder*, when perpetrated "from a premeditated design to do some *great bodily harm*," but the legislature *rejected* it. (3 R. S. 808, § 5, *subd.* 4.)

4. Even if the statute was *ambiguous* in respect to this offence, therefore, such evidence of the *actual intent* should dispel all doubt. (2 *Crompt. & Mees.* 539, *Strickland v. Maxwell*; 4 *Jeffers. Works*, 373, *ed.* 1829; 2 *Hill's R.* 37, 38; 4 *Hill's R.* 397, 401-2, 414-15; 1 *Reddingt. R.* 36, *Buck v. Spafford*; 17 *Verm. R.* 479, *Henry v. Tilson*; 4 *Gill & Johns. R.* 153-4.)

XV. The construction which allows cases like the present to be tried by the test prescribed in the *second* subdivision, will authorize *all* cases to be tried under it, and thus practically annul the *first* subdivision, or render it superfluous. (See *point VIII, sub. 2, 3.*)

1. There is no premeditated act of killing which is not "imminently dangerous to *the deceased or others*, evincing a depraved mind, regardless of human life." (2 R. S. 656-7, § 2; See 24 *Wend.* 521, 552 to 554, *Edwards, Senator.*)

2. And if killing by *beating* may be tried under the second subdivision irrespective of *the intent to effect death*, so may killing by "any other means." (2 R. S. 656-7, § 4, 5.)

3. Evidence of deadly malice *aliunde* would not take the case out of the subdivision, but only aid in showing that the act *was* "imminently dangerous to *the deceased*," &c.

XVI. The question now presented was not involved in either of the three cases relied on by the prosecutor, and the suggestions there made favoring this construction are entirely *extra-judicial*. (13 *Wend.* 159, *Enoch's case*; 19 *Wend.* 569, *Rector's case*; 24 *Wend.* 520, *White's case*; See *Vaughan's R.* 382.)

1. The sole point adjudged in *Enoch's case* was that the general form of indictment used before the statute is sufficient since, and embraces *all kinds of murder*. (13 *Wend.* 159.)

(1) The same doctrine prevails in Pennsylvania, where, as under our law, proof of an intent either *to kill* or commit a *felony* is essential. (*Whart. Amer. Cr. Law*, 410, 420; See also 2 *Croke's R.* 279-80.)

Darry v. The People.

(2) The *obiter dicta* in this case derive no force from being contained in the *only* opinion given; though the contrary seems to have been supposed. (See 19 Wend. 608-9, *Bronson, J.*; but see 2 Hill's R. 38-9; 4 Hill's R. 326; 2 Denio's R. 29, 38; 2 Comst. R. 208; *Vaughan's R.* 382.)

2. The only point adjudged in *Rector's case* was that the court below erred in excluding *evidence of the good character of a witness*; and the *dicta* mainly relied on are in the *dissenting* opinion. (19 Wend. 569, 606 to 609, 616; See 19 Wend. 592-3.)

3. The decision in *White's case*, so far as it relates to the statute definition of murder, even remotely, is *against* the construction claimed by the prosecutor. (24 Wend. 520.)

(1) It holds that if an *indictment* uses the words of the first subdivision, they are *descriptive* of the murderous act, and therefore *material*. (24 Wend. 550, 570 to 573.)

(2) If they are thus rendered material by being *unnecessarily* used in an indictment, they must be equally so when *purposely* used in a statute. (*Bac. Abr. "Statute" (I) pl. 2; Broom's Leg. Max.* 246-7.)

(3) The question whether the second subdivision calls for proof of *deadly malice* was in no way involved in the decision. (24 Wend. 550; *Ram. on Leg. Judgm.* 36.)

XVII. The *dicta* relied on by the prosecutor are inconsistent with the entire scope and policy of the statute, and rest upon the following grounds, all of which are assumed, and none of them maintainable:

1. That the terms *express* and *implied* malice had a definite meaning when the statute was passed, and may be safely used to *explain the intent*, though the *legislature* selected other terms. (13 Wend. 163 to 165, *Nelson, J.*; 13 Wend. 174 to 176, *Walworth, Ch.*; 24 Wend. 557-8, *Furman Senator*; 24 Wend. 568-9, *Verplanck, Senator*; but see point III, *supra*.)

2. That the term *implied* malice, when used to characterize homicide, means *constructive* murder only, as contradistinguished from *intentional*. (13 Wend. 165, *Nelson, J.*; 13 Wend. 174, *Walworth, Ch.*; 24 Wend. 557-8, *Furman, Sena-*

Darry v. The People.

tor; 24 Wend. 568 to 571, *Verplanck, Senator*; but see point III, *supra*; 19 Wend. 592-3.)

3. That the second and third subdivisions are both applicable to the cases of *constructive* murder described by East, and distinguish in an indefinite way between those where *bodily harm* was intended, and others. (19 Wend. R. 606 to 609, *Bronson, J.*; 1 *East's P. C.* 255-6, § 31-2; but see 19 Wend. 592-3, *Cowen, J.*; 24 Wend. 583-4, *Wager, Senator*; point VI, *subd.* 4; point VII, *subd.* 1, 2; points VIII, IX and X.)

4. That cases where *bodily harm* was intended, however slight, are never within the definition of manslaughter in the first degree, though the words do not except them. (19 Wend. R. 608, *Bronson, J.*; but see 19 Wend. 592-3, *Cowen, J.*; 19 Wend. 615-16, *Nelson, J.*; 2 R. S. 661, § 6; 3 R. S. 812, notes, 2d ed.; 3 R. S. 808, § 5, *subd.* 4; 1 *Hill's R.* 456; 20 Wend. 561; 2 *Hill's R.* 35-6; point VI, *subd.* 4; point VII, *subd.* 1, 2; point XI, *subd.* 2, 3; point XIV, *subd.* 2, 3, 4.)

5. That the sole object of the legislature was to restore the common law to what it was when "malice aforethought," meant only *express* malice, a period difficult to find. (13 Wend. 163-4, *per Nelson, J.*; see 13 Wend. 173 to 176, *Walworth, Ch.*; 3 *Coke's Inst.* 47, 51, 52; but see points I, II and III; points VI and VII.)

6. That the statute would have been *better* if the proposed alteration had been declared by a single section, without attempting to make the definition of murder *more intelligible*. (13 Wend. 165, *Nelson, J.*; but see points I, II and III.)

XVIII. Unless the prosecutor has an arbitrary right to elect in every case whether he will prove a deadly intent or not, the accused should have been tried by the test prescribed in the *first* subdivision; his offence, if murder at all being murder from *express* malice to "the person" (*Point XV, supra*; 24 Wend. 520, *White's case*.)

A. Sawin, (District Attorney,) for the people.

I. The killing of a human being without provocation and not

Darry v. The People.

in the heat of passion, by means imminently dangerous to others, evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular person, was murder at the common law, and the "malice aforethought," was in such case termed "*implied malice*," as distinguished from "*express malice*," a premeditated design. (*Foster's Crown Law, Intro. to the discourses on Homicide; ib. chap. 1, § 3; 1 Hale's Pleas of the Crown, 454-5; 1 Russell on Crimes, 452; Roscoe Cr. Ev. 708-9.*) And it was murder whether the means used were imminently dangerous to many persons or only the individual who was in fact killed. (*Vide same authorities.*)

II. Subdivision two of section five of that part of the Revised Statutes relating to murder was designed to be declaratory of the common law in relation to murder from malice implied. (*People v. Enoch, 13 Wend. R. 159.*)

III. Subdivision two embraces those cases where the means, by which the killing is perpetrated, are dangerous only to the person killed as well as when they are dangerous to many. (*People v. Rector, 19 Wend. 569; People v. White, 24 Wend. R. 520.*)

IV. The question whether the means used were of the character and evinced the mind described by the statute, was for the jury; and no complaint is made of any comments of the court on these questions.

DENIO, J.—The offence of murder, though the most heinous crime that can be committed against an individual, had not, either in England or in this state, been subjected to a legislative definition, until it was done in the enactment of the Revised Statutes in the year 1830. By the ancient common law the distinction in felonious homicide between killing with or without malice, was merely nominal, both being indiscriminately punished with death. It was said that although the malice made the fact more obvious, yet it was nothing more than the manner of the fact, and not the substance; and the term manslaughter was used to define the offence in both cases. But

Darry v. The People.

when the benefit of clergy was by statute taken away from murderers with malice prepense, the more modern distinction between that more aggravated form of homicide and the inferior grades came to be recognized. So that at the period when we succeeded to the English common law, the legal definition of murder was well established. (4 *Reeves's Hist. Eng. Law*, 393, 534, 536; 5 *id.* 220-223; *Foster's Crown Law*, 302-306; 4 *Bl. Com.* 201.) The act concerning murder in the revision of 1813, did not attempt a definition of the offence, but was limited to a reenactment of several English statutes, providing for a few particular cases of homicide, bringing them within or exempting them from the penalties of murder. (1 *R. L.* 66.) The description of the offence then, which had prevailed for several centuries prior to 1830, was this: "Where a man of sound memory and of the age of discretion unlawfully killeth any reasonable creature *with malice prepense (or aforethought.*"') (*Coke's 3 Inst.* 47; 1 *Hale's P. C.* 449, 450; 4 *Bl. Com.* 195.) The terms malice prepense acquired a peculiar significance on account of their use in the statute, (23 *Henry VIII*, ch. 1.) That act provided that if any not actually in holy orders should be found guilty (among other crimes) of "any willful murder of *malice prepensed*," they should be utterly excluded from the benefit of their clergy and suffer death in such manner and form "as if they were no clerks." From that time the words referred to became indispensable in the definition of the offence, as only a nominal punishment could be inflicted, if malice were not established by the verdict; and from hence, also, the inferior grades of homicide came to be called manslaughter, while the capital offence was denominated murder. And where a capital conviction was sought it was said to be indispensable that the indictment should contain the words *ex malitia sua præcogitata inter fecit aud murdravit.*" (1 *Hale P. C.* 450.) Though the words in their ordinary sense conveyed the idea of deadly animosity against the deceased, and by a strict interpretation, would perhaps only embrace cases of a killing from motives of revenge, they were not so limited by the construction of the courts. All homicides for which no excuse or palliation was

Darry v. The People.

proved, and a large class of cases where there was no actual intention to effect the death of the party killed, were held to be murder. To justify these convictions an artificial meaning was attached to the words malice prepense, by which they were made to qualify the taking of human life in all cases where sound policy or the demerits of the offender were supposed to require that he should be capitally convicted. Hence the definitions of murder to which I have referred contain the addition that the malice may be *express or implied*. But in drawing the distinction between the two classes, great confusion was introduced. Coke, for instance, classes amongst the instances of implied malice, the cases of poisoning and all cases of the killing of another without any provocation in him that is slain; though it would seem that deliberate poisoning afforded the strongest evidence of deliberate malice, while in the other case, supposing no explanatory evidence to be given, actual malice ought to be proved as a matter of fact upon the evidence. (3 *Inst.* 52.) Hale includes in the class of malice in fact, the case of killing from a deliberate compassing and design to do some bodily injury, and instances *Holloway's case*, where the prisoner tied a lad, who was found trespassing, to his horse's tail, and he was dragged till his shoulder was broken, whereof he died. (*Hale P. C.* 451, 454; *Holloway's case*, *Cro. Car.* 131.) So, he says, if a master designeth an immoderate and unreasonable correction of his servant, either in respect to the measure or the instrument, and death ensues, it is murder from express malice; and so of a school master toward his scholar. (p. 454.) This author in his chapter of "murder by malice implied, or malice in law," includes in that class, cases where the homicide is committed without provocation, where it is upon an officer or minister of police, and where by a person that intends theft, burglary, &c. In the first division, (murder without provocation,) the cases present merely a rule of evidence, as, the law holds that a man intends the natural consequences of his own acts, it determines that where there has been no provocation, or where there has been time for the blood to cool, the killing must be designed and intentional. As was said by Coleridge,

Darry v. The People.

J., in *Regina v. Kirkham*, (6 Carr & P. 115,) "Every one must be intended to presume the natural consequences of his own acts. If you throw a stone at a window it must be taken that you intend to break it, because it is a brittle substance. That being so, if you had heard nothing more than simply that the prisoner taking a knife in his hand had stabbed his son, that would have put it on him to clear himself from the charge of murder." In cases of this kind, if the prisoner could show positively that his intention was not to kill the deceased, he would of course be acquitted. In the other instances on account of the intention to do some other illegal act not touching life, the presumption is *juris* and *de jure*, and the most conclusive evidence that death was not intended would not help the prisoner. Take, for example, the case of a homicide by one engaged in committing a burglary. The party killed may have been a stranger, or even the nearest friend of the prisoner, and he may be able to show in the most conclusive manner that lucre was his only object, and that murder was not at all in his thoughts, and yet he was by law guilty of murder with malice aforethought.

These references are sufficient to show that the term *malice prepense*, had been made the subject of much, and not always intelligible, refinement. Malice in law, or implied malice, was sometimes simply a conclusion from the facts and liable to be overcome by the other facts, and at other times it was an irresistible legal inference, which could not be rebutted. So far from being a descriptive term to be applied as a test to cases as they should arise, it had become simply a part of the name to be given to the offence, when its existence had been ascertained by other tests. It was probably for this reason that the expression was wholly omitted in the revised code. The object of the revisors and of the legislature was to define the offence by the use of language in its ordinary sense, omitting a phrase which, though it tended to mislead rather than instruct, had become technical. The provision respecting murder, as proposed by the revisors, was as follows:

Darry v. The People.

§ 4. The killing of a human being without the authority of law, by poison, shooting, stabbing, or any other means, or in any other manner, is either murder or manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case.

§ 5. Such killing, unless it be manslaughter, or excusable or justifiable homicide, as hereinafter provided, shall be murder in the following cases:

1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being;

2. When perpetrated by an act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual;

3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony;

4. *When perpetrated from a premeditated design to do some great bodily injury, although without a design to effect death.*" (3 R. S. 2d ed. 808.)

The legislature was at the same time informed by the revisors that a lamentable uncertainty prevailed in regard to the distinction between murder and manslaughter; that nothing was so much needed as a settled line of distinction between them; and that the first step to such a distinction was the definition of murder. (*id.*)

These provisions were enacted precisely as reported except the fourth subdivision of the fifth section which was rejected. (2 R. S. 651.) It thenceforward became the duty of the courts by an attentive consideration of the language of these enactments, to ascertain in each case presented for adjudication whether the alleged offence came within the statute. The case of the plaintiff in error would have been of easy solution as the law stood before the revision. The deceased died by his hands, and the bill of exceptions states that there was no evidence given to show any provocation on her part. It was a homicide wholly unexplained. It was also a case of cruel and inhuman violence, unrelieved by provocation, or the heat of

Darry v. The People.

passion, and of a design to do some great bodily harm, from which death resulted, possibly without its being contemplated by the accused. In either case, as a homicide unexplained, or a killing by cool violence unprovoked, it was murder by the common law. Whether under the statute the jury would have been authorized to find a premeditated design to effect her death within the meaning of the first subdivision of the fifth section, is a question not before us, and on which it would be improper to express an opinion. That question was not presented to the jury. The precise question is, whether the second subdivision embraces the case of killing by an unprovoked and cruel beating, the accused not intending to take life. Had the fourth subdivision as reported been enacted it would exactly have met the case. I do not rely very much upon its having been reported and rejected by the legislature. It may have been because they did not intend to punish such a case as murder, and it may have been because it was considered as embraced in the prior provisions. It is, however, a circumstance of some moment, as it would rather be presumed that where a case of frequent occurrence was well described in the projected law, the provision would have been adopted instead of leaving it to be dealt with by a construction upon other provisions less accurately adapted to the case. This consideration is strengthened by the circumstance that a homicide committed in the attempt to do a great bodily injury short of death, without, or with an insufficient, provocation, formed a distinct head of the law of murder by the common law. (See in addition to the books referred to, *Foster's Crown Law*, 262, 291, 296; 4 *Bl. Com.* 199; *Rex v. Riason*, 1 *Str.* 500; *Arch. Cr. Pl.* 394.) In ascertaining the meaning of the second subdivision upon which the plaintiff in error was convicted, it is necessary to look into other instances of murder at the common law, where it is not necessary that there shall be any intention to take the life of the person killed. I refer to cases where death was the collateral consequence of the act which itself was highly criminal. Foster says that "if an act unlawful in itself be done deliberately and with intention of mischief or

Darry v. The People.

great bodily harm to particulars, *or of mischief indiscriminately, fall it where it may*, and death ensue, against or beside the original intention of the party, it will be murder." (p. 261.) One branch of the offence here referred to, is, in a modified form, provided for in the first subdivision. A premeditated design to effect the death of "any human being," is made murder, though the person killed was not at all within the intention of the offender. (*See the Queen v. Saunders, Plowd. 373.*) Then as to the intent to do mischief indiscriminately, by which is meant such as is deadly or very dangerous, almost every writer on criminal law has a division of murder from general malice, or a depraved inclination to mischief, fall where it may. (1 *East. P. C.* 231; *Hale*, 476; 4 *Black. Com.* 200; 1 *Hawk. ch. 29*, § 12, and *ch. 31*, § 6.) The act must be itself unlawful, attended with probable serious damage, and must be done with a malicious intent to hurt people. (*East supra.*) The instances given, are, riding an unruly horse among a crowd of people, the probable danger being great and apparent; throwing a heavy stone into the street when multitudes are passing; firing a gun into a crowd, and the like. No one will deny but that the second subdivision of the fifth section very accurately describes the particular instances of murder just referred to; but the question is whether it is not limited to that, and whether it fairly extends to cases where the intention and the act refer only to the person killed; where the evil intention whether more or less wicked has for its object the one who ultimately becomes the victim. The language does not seem to me to be designed to embrace the last mentioned case. In the first place the act causing death must be one imminently dangerous to others. Why should the greater or less degree of danger be an ingredient when the case supposes that the party against whom it was directed, and for whom it was intended, was killed by it? It must be dangerous to others. The plural form is used, and though I am aware that by a general provision of the Revised Statutes, the plural may be construed to include the singular, I conceive that where a precise definition was intended, and where the distinction between general

Darry v. The People.

and particular malice must have been in the mind of the legislature, the case of imminent danger to the person killed would have been specified had it been intended to embrace it (2 R. S. 778.) The act must evince a depraved mind, *regardless of human life*. These words are exactly descriptive of general malice, and can be fairly applied to any affection of the mind having for its object a particular individual. They define general recklessness and are not pertinent to describe cruelty to an individual. The act by which the death is effected must *evince* a disregard to human life. Now a brutal assault upon an individual may evince animosity and hate towards that person, and a cruel and revengeful disposition, but it could not properly be said to be evidence of a recklessness and disregard of human life generally. Take the case of death ensuing from an intentional immoderate punishment of a servant. The act would be evidence of a disregard of the life of the servant, but not of human life in a general sense. The life of every one, we know, is a human life; but the words are used in this enactment in a general sense, as clearly as when we speak of the uncertainty of human life; or the miseries, the pleasures or the vanity of human life. Again, the killing must be without any premeditated design to effect the death of *any particular individual*. Why did not the legislature say, *of the person killed*? Or, if it were intended to embrace both general and particular malice, *of the person killed, or of any particular individual*? The first subdivision presented an example in immediate proximity, of the phraseology where it was intended to provide as well for the case of particular malice effecting its object, as for malice taking effect in a manner collateral to the intention. Upon the most careful and anxious examination of the provision, I am entirely satisfied that it can not, without violence to the intention of the legislature, as evinced by the language, be applied to the case of homicide resulting from a direct assault by one person upon another.

It is not necessary to maintain that homicide from a cruel assault without a design to effect death could be adequately punished under the provisions respecting manslaughter. It

Darry v. The People.

may be that the failure to enact the provision in the revisors, report, rendered a change necessary in the enactments respecting manslaughter which was omitted through inadvertence. If so, it is a *casus omissus* which the legislature is alone competent to supply.

I have not overlooked the opinions incidentally expressed by Chancellor Walworth and Mr. Justice Bronson in *The People v. White* (24 Wend. 520,) and in *The People v. Rector* (19 Wend. 569). In neither of these cases was this question presented and in both of their opinions the learned judges were dissentients from the judgment of the court upon the points decided in those cases.

The judgments of the courts below should be reversed, and a new trial ordered in the court of Oyer and Terminer.

PARKER, J.—The prisoner was indicted for the murder of his wife. It appeared from the dying declarations of the deceased, that on the night of the 8th of August, after she and the prisoner had retired to bed, the prisoner commenced striking her in the pit of the stomach with his fist, which he repeated on the 9th and 10th of August; he also struck her on the head with his fist and on one of those nights struck her on the head with a chair. The prisoner had been drinking with the step-father of the deceased and during a portion of the time was in some degree under the influence of liquor. The evidence tended to show that the deceased gave no provocation and made little or no resistance to the attacks of the prisoner save in the way of expostulation and request for him to desist. The prisoner and deceased were in a room alone when the injuries were inflicted, but the other part of the house was occupied by her parents and brother, who heard her cries and witnessed many of the acts of violence committed by the prisoner.

The surgeon who examined the body of the deceased was of the opinion that the injuries inflicted upon her stomach caused her death and that the injuries upon her head had no such effect.

Darry v. The People.

There was proof in the case that the prisoner had several times threatened to kill the deceased.

The presiding judge charged the jury, among other things, that in order to convict the prisoner of the crime of murder, it was not necessary that they should be satisfied that the prisoner at the time of inflicting the injuries upon the deceased, entertained a premeditated design to effect her death by means of those injuries, according to the first subdivision of section five. But if they should find upon the evidence that the prisoner designedly inflicted the injuries, that they were inflicted without provocation and not in the heat of passion, but were perpetrated by such acts as were imminently dangerous to the life of the deceased, and evincing on the part of the prisoner a depraved mind, regardless of human life, although without any premeditated design to effect the death of the deceased, that then the offence would come within the statute defining the crime of murder. An exception was taken to the charge.

As it appeared that the injuries upon the head of the deceased had no part in causing her death, we may lay them entirely out of view in considering this case. The whole case then is this. The prisoner made three several assaults upon the deceased and beat her with his fists in the pit of the stomach, which caused her death.

The fact that the prisoner had threatened to kill the deceased certainly made the case a proper one in which to submit to the jury the question, under the first subdivision of the definition of murder, whether the act was done from a premeditated design to effect death. But the judge charged that the prisoner might be convicted under the second subdivision of the definition of murder, which applies to a killing "perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any particular individual."

I think that subdivision was designed to cover a very different class of cases; such as where death is caused by firing a loaded gun into a crowd; by poisoning a well from which

Darry v. The People.

people are accustomed to draw water, or by opening the draw of a bridge just as a train of cars is about to pass over it. In such and like cases, the imminently dangerous act, the extreme depravity of mind, and the regardlessness of human life, properly place the crime upon the same level as the taking of life by premeditated design. But these expressions are not applicable and can not be made so, to a mere case of the commission of a battery with the fists without a design to effect death, but from which death ensues. In this opinion I concur with Senator Wager, in *The People v. White*, (24 Wend. R. 583,) and with Justice Cowen, in *The People v. Rector*, (19 Wend. R. 591,) and differ from other judges who expressed different opinions in those same cases, as well as from the *dicta* in *The People v. Enoch*, (13 Wend. R. 159.) If the judge was right in his charge in this case, there is no security against a conviction for murder in every case where a person merely intends to beat with his fists, and accidentally causes death, and in every other case of manslaughter caused by personal violence. Because the accused could hardly deny that the act was imminently dangerous, when it proved so by causing death; and every beating with the fist evinces a certain depravity of mind, because there is a design to do wrong to the extent at least of committing a misdemeanor; and to some extent there may be considered a regardlessness of human life in such case, because such a beating might cause death. If such a construction is admissible, the absurdity is presented of putting the offence of killing without design by a person engaged in the commission of a misdemeanor on the same level with a killing, without design, by a person engaged in the commission of a felony, and punishing both with death; thus restoring the law as it stood before the adoption of the Revised Statutes, when it is the plainly expressed intention of the revision to mitigate the former offence by reducing it to manslaughter.

A careful examination of the section defining murder, and the sections defining manslaughter will show, I think, very clearly the erroneousness of the charge in this respect. The

Darry v. The People.

section defining murder declares, "such killing *unless it be manslaughter*," &c., shall be murder in the following "cases." This qualification is made applicable to each of the three following subdivisions. *If it is not manslaughter*, it is murder "when perpetrated by any act imminently dangerous to others," &c. If it is manslaughter, that is, if the facts proved bring the case within either of the descriptions of manslaughter, it can in no case be murder. Now in the case before us, if there was no premeditated design to take life, so as to bring it within the first subdivision, and it was upon that supposition that the charge was made, the case falls precisely within the definition of manslaughter in the first degree, (2 R. S. 661.) It was the killing of a human being, without a design to effect death, by the act of a person engaged in the perpetration of a crime or misdemeanor not amounting to a felony, in a case where such killing would have been murder at the common law; and being within the description of manslaughter it could not be murder. To be murder, a case must not only fall within one of the three subdivisions defining murder, but it must *not* fall within any of the definitions of manslaughter.

If full effect be thus given to the words "*unless it be manslaughter*," in the preliminary part of the section defining murder, the second subdivision of that section will only be applicable to the class of cases above indicated. All others growing out of personal rencontres and confined generally to two persons only will be found to fall within some of the definitions of manslaughter, and of course without the second definition of murder.

With this construction, crimes will also be properly graduated according to the intention of the revisors. If A attempt to cowhide B, for having libeled him and death accidentally ensue, the crime will be manslaughter in the first degree, because the assailant was engaged in committing an assault and battery only. But if A attempt to cut off the hand that wrote the libel and death accidentally follow, the crime will be murder, because A was engaged in the commission of the felony of mayhem.

Darry v. The People.

It is evident, the presiding judge in charging the jury had in his mind the idea that the case, to be murder, must not fall within the definition of manslaughter, for he made it a condition to bringing the case within the latter, that the jury should find the injuries "were inflicted without provocation and not in the heat of passion." But he overlooked the definition of manslaughter that was alone applicable. He should have specially called their attention to the definition of manslaughter in the first degree, and if he alluded to the second subdivision of the definition of murder at all, he should have told them it could not fall within that, if it was a case of killing without a design to effect death while engaged in committing an assault and battery only. If there was a design to effect death, it would of course have fallen under the first subdivision of the definition of murder. If there was any question on that point, it should have been submitted to the jury to find whether it was murder under the first subdivision or manslaughter in the first degree.

If this case was properly submitted to the jury, as falling under the second subdivision of murder, so might a case be thus submitted when death was caused without design by a person engaged in a felonious assault upon the person killed, which is one of the cases expressly provided for in the third subdivision. But the construction I have put on the second subdivision, confines each subdivision to a distinct class of cases and renders it entirely inapplicable to any other.

But it has been said, (*People v. Rector*, 19 *Wend. R.* 608,) that the sixth section of the statute defining manslaughter in the first degree, is not applicable to a case where the party causing death without design is engaged in an assault and battery. I find no warrant for such a position. No exception of that offence is made in the statute. The language is, "the killing of a human being, without a design to effect death, by the act, procurement, or culpable negligence of any other, while such other is engaged: 1st. In the perpetration of any crime or misdemeanor not amounting to a felony; or, 2d. In an attempt to perpetrate any such crime or misdemeanor, in

Darry v. The People.

cases where such killing would be murder at the common law, shall be manslaughter in the first degree." This section is thus made expressly applicable to all crimes and misdemeanors not amounting to felony, and it is certain an assault and battery is one. The statute nowhere confines this section and the third subdivision of the section defining murder to other offences than those of intentional violence.

It is said that this plain construction of the act would make every case murder, because being engaged in assault and death ensuing, it becomes the felony of manslaughter, and being engaged in such felony and death ensuing it is murder. But it leads legitimately to no such result. The intent regulates the crime, unless otherwise provided. If the party intends an assault and battery and death ensues without design, he is guilty of manslaughter. If he intends a mayhem or other felony to the person, and death ensues without design, it is murder. The law makes a person responsible for consequences not designed in proportion to the grade of offence designed.

This construction supposes an attempt coolly and deliberately made to commit a battery, and the offence of unintentionally causing death in such a case is the first degree of manslaughter. If there is the excuse that the act was done in the heat of passion, though in a cruel or unusual manner, or with a dangerous weapon, it is mitigated by the tenth and twelfth sections to manslaughter in the second degree, and if done in the heat of passion, but not in a cruel or unusual manner, and not with a dangerous weapon, it is reduced by the eighteenth section to the fourth degree.

It may be that these respective crimes are not properly graduated or punished in proportion to the moral delinquency. But the disproportion would be much greater, if we hold that death ensuing without design from the commission of a battery is not manslaughter in the first degree within the description of the sixth section. With such a construction, and with a construction of the second subdivision of the definition of murder like that adopted at the trial, the question for the jury would not be, whether the crime was murder or manslaughter

Darry v. The People.

in the first degree, but it would be whether it was murder or manslaughter in one of the lower degrees; thus making a leap from murder to manslaughter in the fourth degree, from a crime punishable with death, to one punishable in a county jail, with but a shade of difference between them. The very case before us falls at once to manslaughter in the fourth degree, if excluded by such a construction from the first degree.

It is objected, that if my construction of the first degree of manslaughter is correct, it would cover every other degree of manslaughter, for in every case provided for the lower degrees, there is also an assault and battery and death ensues. I answer, the general description in the first degree can not be considered as applicable to cases particularly described in the lower degrees. The first degree gives the general description, the lower degrees the exceptions, as when the act is done in the heat of passion, &c. It is far more consistent to hold that the description in the first degree does not apply to cases described in the second and third degrees, than to hold it is not applicable to any case of assault and battery where death ensues. There is much less violence done to the language of the section by my construction than by that against which I contend. There is reason in holding that the first section, being in general terms, is not applicable to cases specially described. Though within the general language, it may well be supposed the legislature did not intend to include them, because they are provided for specially in other sections. But it seems to me it is refusing obedience to the statute to say, that it is not intended to be applied to any case of assault and battery, when no exception of that offence is made.

But, whatever, may be the true construction of the sixth section defining manslaughter in the first degree, I am clearly of the opinion, that the court below erred in attempting to bring the case within the second subdivision of the section defining murder. The offence was either murder by design under the first subdivision or manslaughter in *some* degree.

If I were sitting in the Oyer and Terminer, and perhaps if sitting in the Supreme Court, I should feel bound by the opin-

Darry v. The People.

ions expressed on these points by those learned judges who constituted a majority of the court in deciding the Rector case. But in this court, where this question has not been decided, and where we are bound by no such opinions expressed in an inferior tribunal, I think it is our duty to settle the construction of these sections of the statute by giving to them the effect which must have been originally intended, and thereby placing the different statutory provisions more in harmony with each other.

My conclusion is, therefore, that the court of Oyer and Terminer erred in its charge to the jury, and that the judgment of that court and of the Supreme Court should be reversed.

SELDEN, J.—The substitution of new and original phraseology in our statute defining the crime of murder, (2 R. S. 651, § 5,) was the result of an effort to clear the subject of the obscurity which grew out of the inaccurate use of some of the terms of the common law. To render this effort successful it is necessary to construe the new terms used according to their plain and natural import; a resort to the rejected terms, in order to interpret those newly adopted, would obviously reinvest the subject with much of the previous uncertainty, and render abortive this attempt at elucidation.

When, therefore, it is said, as has been said by several of our judges, that the first subdivision of section five of our statute, was intended to define murder from *express*, and the second and third from implied, malice, no light whatever is thrown upon the true interpretation of the section.

A glance at the law of murder as it existed prior to the Revised Statutes will make it evident that the terms *express* and implied malice, and malice aforethought, used so copiously in every definition of murder at common law, must have been intentionally excluded from the statute; and I think it equally clear, in view of the great looseness and inaccuracy with which these terms had been used, that this exclusion was wise.

There is no difference in the nature or degree of the malice, intended, whether it be called *express* or implied, when these

Darry v. The People.

terms are used in their most appropriate sense. If properly applied, they refer only to the evidence by which the existence of malice is established. Both alike, the one no less than the other, mean *actual* malice, malice shown by the proof to have really existed. It is called implied malice when it is inferred from the naked fact of the homicide, and express when established by other evidence.

That this is the true original meaning of these terms, when used in connection with this crime, is apparent, I think, from the natural import of the words themselves, as well as from their accustomed use in other branches of the law. They are appropriate terms to express different *modes of proof*, and are habitually used for that purpose; but are not adapted to the description of different degrees of malicious intent.

The phrase "implied malice" is properly applied to a case where the evidence shows that the accused did the act which caused the death, but when there is no *other* proof going to show the existence or the want of malice. In such cases, the law does not *impute* a malicious intent irrespective of its real existence, but it presumes, in accordance with the settled rules of evidence, that such intent did actually exist.

York's case (9 *Metcalf*, 93,) was a case of this description, and the rule as well as the reason upon which it rests are those stated by Chief Justice Shaw. In speaking of the mere act of destroying life, he says, "The natural and necessary conclusion and inference from such an act wilfully done without apparent excuse are, that it was done '*malo animo*' in pursuance of a wrongful, injurious purpose, previously, though perhaps suddenly formed and is therefore a homicide with malice aforethought, which is the true definition of murder. And it appears to us that this is not a *forced, arbitrary, technical or artificial presumption of law*, but a natural and necessary inference from the fact."

Again he says, "A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural and probable consequences of his own act."

This case and this reasoning afford a clear illustration of

Darry v. The People.

what is properly meant by the term *implied* malice. But the same term has also been frequently, but as I maintain, inappropriately used to express a different meaning. It has been extensively applied to cases of constructive murder, that is, to those cases where, although the want of any actual intent to take life is conceded, yet the law in view of some other malicious or criminal intent, punishes the offence as murder; and to cases of death produced through an utter wantonness and recklessness as to life in general, as well as to cases where the life of an officer is unintentionally taken when engaged in the performance of his duty. (15 *Viner's Abr. title Murder, E, Rex v. Oneby*, 2d *Ld. Raym.* 1488; *People v. Enoch*, 13 *Wend* 159, *per Nelson, J.*)

Now what is meant by this application of the term *implied malice*, indiscriminately to all cases arising under either of these several classes? It is apparent that so far as any actual criminal intent exists, it may be expressly proved in these cases as well as any others. It follows, therefore, that in cases where such proof is given, implied malice, if it means any thing, must mean malice which has no existence in fact, but which the law *imputes* to the guilty party.

This implication of a species of malice which did not exist, seems to have been invented for the purpose of bringing cases of constructive murder, so called, within what was supposed to be the legal definition of the crime. It was evidently supposed that the word malice meant in all cases ill will towards some *person or persons*; and hence that the phrase *malice aforethought*, used in indictments for murder, necessarily imported a charge of premeditated design to kill. To meet this averment which in cases of constructive murder was not required to be proved, the law was said to imply, that is, to supply by *mere fiction*, the requisite degree of malice.

There was, however, in truth, not the slightest necessity for this fiction; the interpretation of the word malice in which it was founded being strictly erroneous. The idea that the term malice necessarily imports ill will towards another, when used in a legal sense, is abundantly refuted by Mr. Justice

Darry v. The People.

Bayley in the case of *Bromage v. Prosser*. (4 *Barn. & Cress*. 255.) He says: "Malice in common acceptation means ill will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle without knowing whose they are; if I poison a fishery without knowing the owner, I do it of malice because it is a wrongful act and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse."

This passage is cited and approved by Chief Justice Shaw in *Yorke's case* (9 *Metcalf*, 93,) and there are many other authorities to the same effect. To show that the view here presented is in entire accordance with the ancient law, I will give a passage or two from Foster, one of the earliest and clearest writers on criminal law. (See *Foster's Cr. Law* 256-7.) He says, "Where the law maketh use of the term *malice aforethought* as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense to which the modern use of the word malice is apt to lead one, a principle of malevolence to particulars; for the law by the term malice in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved malignant spirit."

Again, he says: "And I believe that most, if not all the cases which in the books are ranged under the head of *implied malice*, will if carefully adverted to, be found to turn upon this single point; that the fact hath been attended with such circumstances as carry in them a plain indication of a heart regardless of social duty and fatally bent on mischief."

This is the precise doctrine for which I contend. It shows that the resort of a fictitious imputation of a species of malice having no existence in fact, called implied malice, was gratuitous and unnecessary; and being so, it could scarcely fail to be pernicious.

Darry v. The People.

It tended to introduce confusion through the indiscriminate use of the word *implied* in two conflicting senses; one importing an inference of actual malice from facts proved; the other an imputation of fictitious malice without proof

In putting a construction therefore upon our statute, we should lay aside entirely the common law terms of express and implied malice as calculated to mislead and to engender false ideas; and interpret the phraseology as before insisted, according to its ordinary import. Looking then at the statute itself, and construing it in this spirit, what is its real scope and meaning?

In endeavoring to answer this inquiry it is important to keep in view certain rules which reason and experience have established as calculated to aid in the just interpretation of statutes.

If the enactment be subdivided, each subdivision should be construed so as to provide for a separate and distinct class of cases, and so as to include all cases it is intended to embrace, and to exclude all others.

Each clause is also to be construed in the light of all the rest, and so as to give force and effect to every sentence and word; and such a construction is to be put upon the whole, if possible, that no case or class of cases will fall within more than one branch of the act.

These rules are necessary, in order to attain that precision and certainty which is the object of the subdivision.

There is, I believe, no great contrariety of opinion as to the meaning of the first subdivision of section five of the statute in question. If there is any difficulty in this respect, it is in ascertaining whether the last clause of that subdivision, viz: "or of any human being," was intended to provide solely for cases where the premeditated design, although not aimed at the person actually killed, was nevertheless directed to some *particular* individual; or whether it also includes cases where it was aimed indiscriminately at a multitude of persons, or at human life in general.

That the former is the true interpretation was insisted by the

Darry v. The People.

prisoner's counsel upon the argument, for several reasons. He urged, First, that on comparison of section five of our statute with the description of murder from malice aforethought, express, as given in *East P. C. 223*, § 10, and considering that the revisers in their note to section five, expressly say that it was compiled partly from *East*, it is apparent that the two first subdivisions of section five were copied substantially from the definition given by *East*; the only material difference being that the two first subdivisions of *East*, are in our statute condensed into one; and that as both subdivisions in *East* are plainly and expressly confined to cases of malice to a particular individual, the corresponding subdivision in our statute should receive the same construction. Again he contended, that as the first clause of this subdivision was clearly confined to cases of particular malice, the last being directly connected with it, should be held to belong to the same class, agreeably to the maxim, *Noscitur a sociis*. (*Broom's Leg. Max. 294*; *Evans v Stevens*, 4 Term R. 225.)

I have very little hesitation in adopting the construction of this subdivision thus contended for, not only for the reasons given by the counsel, but for others which will appear when we take into consideration the second subdivision. This brings us to the difficult part of our task, that of interpreting the second subdivision of the section in question. This subdivision was incidentally and partially considered in the *People v. Rector*, 18 Wend. 569,) and in the *People v. White*, (24 Wend. 520.) But the examination given to it in those cases was cursory merely, and no attempt was made to subject it to that rigid analysis which is indispensable to the development of its true meaning. It becomes necessary therefore, in my view, to look at the subject as an original question. In doing so, I shall inquire, first, whether an actual intent *to destroy life*, is in all cases essential to constitute the crime of murder under this subdivision. The affirmative of this question was very strenuously contended for by the counsel for the prisoner upon the argument, and great learning and ability were displayed in the

Darry v. The People.

effort to maintain it. He contended that there was a substantial identity of design and object, between our statute and that of Pennsylvania, passed in 1694; and that as the latter statute had been construed to limit murder as a capital crime, except in a few specified cases of constructive murder, to those cases in which an actual intent to take life exists, ours should receive the same construction; and insisted that the first subdivision of section five, being intended to provide for all cases, where the hostile intent was specially aimed at the life of some one individual, the second subdivision was designed to embrace only those cases excluded from the first, where the intent, although deadly, does not single out its object.

But there are serious objections to taking this view of the latter subdivision, conceding the construction thus put upon the first to be, as I think it is, correct. Of what use, upon this supposition, are the words "imminently dangerous to others." Are they not rendered mere unmeaning verbiage by assuming that an actual intent to take life is essential to the crime under this subdivision? Again, if such an intent is necessary, the requirement must be found in the definition of the crime given by the statute. The only affirmative words indicative of the intent required, are these: "A depraved mind regardless of human life." These words describe the state of mind which must accompany the act. Do they express a formed intent to destroy life? Clearly not. No sound reason can be given why the legislature should have resorted to such equivocal and circuitous phraseology to express that single intent. Such an intent is expressed in clear terms in the subdivision which precedes, as well as that which follows the one under review; would they not have expressed the same intent in the same way in this, if that was what was meant? Would they have resorted to phraseology not only peculiar, but such as does not import what upon this supposition they intended? It seems to me not.

But this is not all. The phraseology of the subdivision is taken substantially from the writers upon the common law. An absolute intent to take life was not necessary at common

Darry v. The People

law to constitute the crime described by the phraseology. As to this, there is no room for doubt.

The first general division of homicide as given by East, is as follows: "From malice aforethought express; when the deliberate purpose of the perpetrator was to deprive another of life, *or do him some great bodily harm.*" (1 East P. C. 222, § 9.) This general division of homicide is again divided by East into three subdivisions in the next section, as follows:

1. From a particular malice to the person killed.
2. From a particular malice to one, which falls by mistake or accident on another.
3. From a general malice or depraved inclination to mischief, fall where it may.

Now as this third subdivision is obviously a specification of the nature of the cases falling within the last clause of the previous general division, it is entirely clear that it was intended to describe a class of cases in which a deadly intent is not required to make out the crime.

It has been already intimated that the first subdivision of section five of our statute, appears to be a virtual transcript of the first two subdivisions just given from East. It is, I think, equally apparent that the second subdivision in our statute, was taken substantially from the third subdivision of East, although not a literal transcript of it. The inference from this is very strong that it was intended to describe the same class of cases; and if so, then it follows from what has already been said, that a deadly intent is not necessary to constitute the crime of murder under it. But there is an important clause added to the second subdivision in our statute which does not appear at all in East; and it becomes indispensable to ascertain its design and object. If we can discover the true object of introducing this clause, we have a key to the interpretation of the whole section. The words are, "although without any premeditated design to effect the death of any *particular* individual." These words must have been introduced for some purpose; what was it?

I remark first, that they were not designed to show that a

Darry v. The People.

particular deadly intent is not essential to constitute the crime; because they could not have been deemed at all necessary for that purpose. The idea of such a necessity seems as we have already shown, to be excluded by the whole phraseology of the subdivision. No corresponding language is contained in East's definition of this class of murders. He evidently considered the definition complete and perfect without it. Besides, if this clause was introduced for that purpose the plain implication would be that a general deadly intent not aimed at any particular individual was necessary. This would be repugnant to all our previous reasoning, and would exclude from the operation of the subdivision the very cases which at common law marked the class. This view of the clause would also effectually exclude the case at bar from the subdivision. But I consider it clear from what has been heretofore said, that this could not have been the object of the clause.

There is but one other purpose which this alone could have been intended to subserve. Although the terms of the second subdivisions do not *require* a deadly intent to make out the crime, yet independent of the clause in question they do not exclude it. Hence the second subdivision might be construed to embrace most, if not all the cases provided for in the first. This would defeat the very object of the classification, which was to draw a clear line of distinction between the different classes, and prevent confusion by their merger.

The plain object therefore of the last clause of the second subdivision, and the only conceivable object, I hold to have been, to mark the distinction between that subdivision and the first, by at once excluding from the former all cases of *particular*, and at the same time showing that it was not intended to exclude cases of *general*, deadly intent.

Assuming this to have been its object, it is apparent that force and significancy is given to every word of the clause in question, and that each of these subdivisions is made to stand out, isolated and distinct, with boundaries clearly marked, and with no tendency to fusion with each other.

It will be seen that this view necessarily limits the first sub-

Darry v. The People.

division to cases of particular malice, from the antithetical relation between that subdivision and the last clause of the second. This will be made more apparent by reading the two clauses in connection, omitting the intermediate significant words thus: "when perpetrated from a premeditated design to effect the death of the person killed or of any human being, or when perpetrated," [in a certain way,] "although without any premeditated design to effect the death of any particular individual."

I doubt whether any other reading can be adopted which will at once give scope and meaning to every word of both subdivisions, and at the same time accomplish the object of drawing a definite and clear line of demarcation between the two.

We have then the precise classification of East; the only difference being that in our statute, it is simplified by reducing the first two subdivisions into one; and rendered a little more definite by the *express* exclusion from the last subdivision, of all cases embraced in the first.

What then are the cases, which upon this construction, were intended to be excluded in the second subdivision? In considering this question, it is clearly proper in the first place to inquire what kind of cases were embraced in the corresponding class as defined by East.

The words in East are, "from a *general* malice or depraved inclination to mischief, *fall where it may.*" The word "general" here used and the last words of the sentence leave no doubt as to the nature of the cases contemplated by this subdivision. They were cases of depraved reckless conduct, aimed at no one in particular, but endangering indiscriminately the lives of many, and resulting in the death of one or more.

If this be not clear upon the words themselves, the comments of Mr. East upon this subdivision would seem to put the matter at rest. (1 *East's P. C.* 231, § 18.) In illustrating this subdivision he says: "The act must be unlawful, attended with probable serious danger, and must be done with a mischievous intent to hurt *people*, in order to make the killing amount to murder in these cases," and the instances he gives are as fol-

Darry v. The People.

lows: "If a person breaking in an unruly horse wilfully ride among a *crowd* of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder." Again, "So if a man knowing that *people* are passing along the street, throw a stone like to create danger, or shoot over the house or wall, with intent to do hurt to people and one is thereby slain, it is murder."

These are the only examples given, and they accord perfectly with the language of the subdivision, and show that the latter was intended to embrace those cases of general malice only, where the lives of *many* were, or might be, in jeopardy. The inference is very strong that the subdivision of our statute which we are considering, was intended to provide for the same cases as that of East, from which it was substantially taken. But the argument in favor of this construction is by no means confined to this inference.

It is clear, I think, from what has been already said, that the subdivision in question does embrace those cases where an intent to take life exists, which is not directed to any particular individual, but is general and indiscriminate. The language of the subdivision however at the same time shows that it was not intended to be confined to those cases, but was designed to include another class closely akin to, and almost identical with those in which death is produced by acts, putting the lives of many in jeopardy, under circumstances evincing great depravity and utter recklessness in regard to human life.

For instance, a man may fire into a crowd with the view of destroying life, and he may do so for the mere purpose of producing alarm, although at the imminent hazard, as he knows, of killing some one. Again: he may open the drawbridge upon a railroad with the intent to destroy the lives of the passengers, or he may do it for the sole purpose of effecting the destruction of the property of the railroad company.

The subdivision in question was intended to provide for all these and similar cases indiscriminately, putting them upon the same footing without regard to the particular intent.

The phrases "imminently dangerous to others" and "de-

Darry v. The People.

praved mind regardless of human life," have an apt and intelligible meaning when used in regard to such cases.

If then the subdivision was intended to include cases of this description, it would seem to follow, upon the plainest principles of construction, that cases of death produced by acts affecting a single individual are excluded. It would be repugnant to all sound rules of interpretation, to associate under the same clause of a statute, groups of cases so dissimilar as those, examples of which I have just given, and ordinary homicides; especially where, as in the present instance, an attempt has been made in framing the statute, at the precise classification of the cases arising under it.

The examples which I have given as falling within the provisions, belong to a class having marked features, easily distinguished from all others; and there is no difficulty in so construing the subdivision in question as to exclude cases not belonging to this class, and at the same time so as to include all cases falling properly within it.

For these reasons, I am entirely satisfied that this subdivision was designed to provide for that class of cases, and no others, where the acts resulting in death and calculated to put the lives of *many persons* in jeopardy without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequence. Such acts may well be said to evince that reckless disregard and indifference to human life which is fully equivalent to a direct design to destroy it. The moral sense of mankind distinguishes between acts of this sweeping and widely dangerous character and ordinary cases of individual homicide; and so in my judgment does the statute.

But there is an additional reason for putting this construction upon the subdivision in question. If it can be so construed as to include the case at bar, and others of a similar description, we are left wholly without any line of distinction between murder and manslaughter, except the loose and uncertain opinion of a jury as to whether the act which produced death did or did not evince a "depraved mind regardless of human life."

Darry v. The People.

There is scarcely a case of manslaughter which, upon this construction, may not be brought within the definition of murder, and punished as such, provided a jury can be found to say, that the act which produced death evinced a "depraved mind regardless of human life." Because the other clause, to wit, "imminently dangerous to others" if it can apply to this, would apply to every case of homicide; as the result would always prove the imminently dangerous nature of the act; and because upon this construction cases of homicide committed unintentionally in the heat of passion would not be excluded, as such a case might very well evince a depraved mind regardless of human life in the opinion of a jury.

This construction then would throw us upon that sea of uncertainty which it was the special object of the revisers in framing, and of the legislature in adopting the section in question, to avoid.

My conclusion therefore is, that the only construction which is consistent with the language of the section as a whole, with the object aimed at in its adoption, with the precision and certainty of the law, and with the convenient and safe administration of justice, is that which I have already given.

I omit to express any opinion as to the particular degree of manslaughter within which this case is embraced, it being unnecessary to the decision of the cause.

The question was somewhat agitated upon the argument, but ought perhaps to be more fully discussed and more deliberately considered before it is definitely settled.

It follows from what has been said, that the judge erred upon the trial in submitting the case to the jury under the second subdivision of the section of the statute in question, and consequently that there must be a new trial.

EDWARDS, ALLEN and JOHNSON, JJ., concurred.

GARDINER, Ch. J., and RUGGLES, J., read opinions for affirmance.

Conviction reversed and new trial awarded.

SUPREME COURT. Kings General Term, July, 1855. *Brown, Rockwell and S. B. Strong*, Justices

THE PEOPLE *vs.* JOHN CAVANAGH.

Error committed by a criminal court having jurisdiction of the offence and of the person of the prisoner can not be re-examined on *habeas corpus*; whether the error occurred at the trial or is alleged to exist in the judgment rendered, the only remedy is by *certiorari* or *writ of error*.

Though, in such case, matters anterior to the judgment can not be reexamined on *habeas corpus*, yet the officer may discharge for reasons arising subsequent to the judgment, such as the expiration of the term of imprisonment, the payment of the fine imposed, or reversal of the judgment or an executive pardon.

When the imprisonment is under process valid on its face it will be deemed *prima facie* legal and the prisoner must assume the burthen of proving its validity by showing a want of jurisdiction.

Error, irregularity, or want of form is no ground for discharging on *habeas corpus*: nor is any defect which may be amended or remedied by further entry, or by motion.

A court of Oyer and Terminer is a court of superior criminal jurisdiction, having power to try all crimes and misdemeanors and though its record does not show the service of process on the defendant, its jurisdiction over the person will be presumed.

Upon a conviction at the Oyer and Terminer, it is sufficient to state in the entry of judgment in the minutes, under the requirement of 2 R. S. 728 § 5, that the defendant was convicted of a misdemeanor; and a more particular description of the offence need not be stated. Nor is a more particular description of the offence necessary in the warrant of commitment.

Where, on *habeas corpus*, it becomes material to know of what particular misdemeanor the prisoner was convicted, in order to determine whether the commitment was legal, resort may be had to the record, if one has been made up and filed, and if not, to the indictment upon which he was tried and convicted and to which the entry in the minutes refers.

It forms no ground for a discharge on *habeas corpus*, that the court of Oyer and Terminer erred in sentencing a prisoner, convicted of a misdemeanor, to imprisonment in the county jail, instead of the penitentiary.

Forms of writ of *certiorari* to remove decision on *habeas corpus*, and of return thereto, including petition for *habeas corpus*, return and traverse, and decision.

This case came up on *certiorari*. It was brought for the purpose of reviewing a decision made on *habeas corpus*, by Mr. Justice Dean, reported in 1 *Park. Cr. R.* 588.

The writ of *certiorari* was as follows:

The People v. Cavanagh.

The People of the state of New York to Gilbert Dean, Esq.,
one of the justices of the Supreme Court of the state of
New York, greeting:

Whereas we have been informed by the complaint of Richard
C. Underhill, district attorney of the county of Kings,
[L. s.] that certain proceedings were had before you on
behalf of John Cavanagh, lately convicted of a mis-
demeanor in our court of Oyer and Terminer, of the county of
Kings, and imprisoned, pursuant to sentence thereon, in the
common jail of said county, whereby an order was made by
you on the third day of October, in the year one thousand eight
hundred and fifty-four, allowing a writ of habeas corpus, tested
of that day, and directed to Englebert Lott, sheriff of said
county and keeper of the common jail thereof, commanding him
to bring before you, the said justice, the body of the said John
Cavanagh, together with the cause of his imprisonment, at the
city hall, in the city of Brooklyn; and whereby a certain other
order was made by you in said proceedings upon the return of
said writ on the fifth day of October, in the year aforesaid,
discharging the said John Cavanagh from his imprisonment
aforesaid; and we being willing, for certain reasons, to be cer-
tified of the said proceedings, writ and orders, and all things
appertaining thereto, do command you that you certify the
same, with all things appertaining thereto, unto our justices of
our Supreme Court, at the city hall, in the city of Brooklyn,
on the first Monday of November, in the year one thousand
eight hundred and fifty-four, under your seal, as fully and
amply as the same remain before you, that our said justices
may cause to be done further thereupon what of right and
according to law ought to be done, and have you then there
this writ.

Witness Selah B. Strong, Esq., justice of the Supreme Court,
at the city hall of Brooklyn, the twenty sixth day of Octo-
ber, in the year one thousand eight hundred and fifty-four.

C. A. DENIKE, Clerk.

R. C. UNDERHILL, *Dist. Attorney of Kings county.*

The People v. Cavanagh.

(Endorsed.) On the application of R. C. Underhill, district attorney of Kings county, upon his affidavit sworn to October 26, 1854, I allow the within writ of certiorari to issue; and let said affidavit be filed in the office of the clerk of Kings county. Dated October 26, 1854.

W. ROCKWELL, *Justice of the Supreme Court.*

To which the following answer was made:

The answer of Gilbert Dean, one of the justices of the Supreme Court, to the writ of certiorari hereto annexed.

By virtue of and in obedience to the writ of certiorari hereto annexed, and to me directed, I do hereby certify and return to the justices of the Supreme Court, that on the third day of October, in the year one thousand eight hundred and fifty-four, a petition of John Cavanagh was presented to me, duly verified, which petition is as follows:

To the Supreme Court of the state of New York.

The petition of John Cavanagh respectfully shows, that he is unjustly and unlawfully restrained of his liberty, and detained in the county jail of the county of Kings, as a prisoner, by Englebert Lott, Esq., sheriff of the said county of Kings, and that he is not committed or detained by virtue of any process issued by any court of the United States, or by any judge thereof, nor is he committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree; that the cause or pretence of such detention and imprisonment, according to the best of the knowledge and belief of your petitioner, is the minute of conviction of your petitioner of an alleged misdemeanor at a court of Oyer and Terminer, held in and for the county of Kings, and the sentence of said court thereupon, a copy of which said minute of conviction and sentence is as follows:

At a court of Oyer and Terminer held in and for the county of

The People v. Cavanagh.

Kings, at the court house, in the city of Brooklyn, on the twelfth day of September, in the year of our Lord one thousand eight hundred and fifty-four. Present—The Hon. Wm. Rockwell, justice, presiding; Henry A. Moore, county judge; Nicholas Stillwell and Samuel S. Stryker, justices of the peace.

The People of the state of New York, }
vs. } Convicted of misdemeanor.
John Cavanagh.

Thereupon, it is ordered and adjudged by the court, that the said John Cavanagh, for the misdemeanor aforesaid whereof he is convicted, be imprisoned in the common jail of Kings county for the term of thirty days, and pay a fine of two hundred and fifty dollars, and in default of payment of said fine to be imprisoned for a further term not exceeding six months.

And your petitioner respectfully suggests, as matter of error in said minute of conviction, that the same does not show and set forth of what offence your petitioner was and stands convicted, and does not show and set forth that your petitioner was convicted of any offence at all.

Your petitioner further shows, that in and by an act of the legislature of the state of New York, passed April 5th, 1853, entitled "An act relating to the penitentiary in the county of Kings," it was enacted and provided as follows:

1st. Whenever the penitentiary in the county of Kings shall be ready for the confinement of prisoners therein, the board of supervisors of said county shall file a certificate thereof in the office of the clerk of said county, and also publish a notice of the same for three weeks successively in one or more newspapers published in said county.

2d. After the filing of said certificate, and the publication of said notice, it shall be the duty of all magistrates and courts in said county to sentence all persons who, on conviction, are liable (except in capital cases) to imprisonment for a period of not less than thirty days, to confinement in said penitentiary instead of the county jail; and the keeper thereof shall receive such persons and safely keep for the term for which they were

The People v. Cavanagh.

sentenced, and employ them according to the government of said penitentiary.

And your petitioner further says, that as he has been informed, and believes to be true, the board of supervisors of the said county of Kings, prior to the conviction and sentence of your petitioner, the said penitentiary being ready for the confinement of prisoners therein, filed the said certificate and published a notice of the same, as is directed and required by said act. By reason whereof the said sentence of your petitioner to imprisonment in the said county jail was illegal.

Wherefore your petitioner prays that a writ of habeas corpus issue, directed to the said Englebert Lott, sheriff as aforesaid, commanding him to bring your petitioner before your Honor, to be dealt with according to law.

JOHN CAVANAGH.

Kings county, City of Brooklyn, ss:

John Cavanagh, the petitioner in the foregoing petition, being duly sworn, says, that he has heard the foregoing petition read, and that he knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

JOHN CAVANAGH.

Sworn to before me, this 3d day of October, 1854,

A. McCUE, *Com. of Deeds.*

That I did thereupon, pursuant to the prayer of said petitioner, order and allow a writ of habeas corpus to issue to Englebert Lott, sheriff of said county of Kings, commanding him to have before me the body of the said John Cavanagh, together with the cause of his imprisonment, at the city hall of the city of Brooklyn, on the fourth day of October, 1854; at which last mentioned time and place appeared before me the said sheriff, together with the said John Cavanagh, and also the district attorney of said county, on behalf of the people, and the said sheriff did then and there return to the said writ of habeas corpus that he had said John Cavanagh then pre-

The People v. Cavanagh.

sent, and that he held and detained him under and by virtue of a commitment annexed to said return, and of which a copy is set forth in the foregoing petition, which commitment was duly certified by the clerk of the court of Oyer and Terminer therein mentioned, to be a true extract from the minutes of said court, and was sealed with the seal thereof.

And thereupon the said John Cavanagh did traverse said return of said sheriff, which traverse is as follows:

In the matter of the application of John Cavanagh on habeas corpus.

Kings County, City of Brooklyn, ss:

John Cavanagh, the petitioner, being duly sworn, says, for traverse to the return of the sheriff to the writ of habeas corpus in this case, that the same is not sufficient to hold and detain him, for that on the face of said return it does not appear that the court of Oyer and Terminer had authority to direct the imprisonment of your petitioner at all, or that it had any authority to direct the imprisonment of your petitioner in the county jail; for that there existed in the county of Kings a penitentiary, which is the place designated by law for the imprisonment of all persons who, on conviction, are liable (except in capital cases) to imprisonment for a period of not less than thirty days, and which is the only place in which your petitioner, under the conviction against him, could be legally imprisoned.

JOHN CAVANAGH.

Sworn to before me, this 4th day of October, 1854.

G. DEAN, *Justice of Supreme Court.*

Whereupon I did then and there proceed to hear the allegations and proofs produced in behalf of said prisoner, and also in behalf of said people; and being satisfied upon such hearing that the penitentiary of said county of Kings had been made ready for the confinement of prisoners therein, and that a certificate and notice thereof had been duly filed and published pursuant to the act of the legislature of the state of New York,

The People v. Cavanagh.

mentioned in said petition, I did thereupon, for the reasons stated in the annexed opinion, make and endorse upon said writ of habeas corpus an order as follows:

In the matter of the habeas corpus issued to the sheriff of Kings county, to bring up the body of John Cavanagh, by him detained with the cause, &c.

On the return of the sheriff made to the within habeas corpus, and the traverse thereof on behalf of the prisoner, and on hearing the district attorney on behalf of the people, and the counsel of the prisoner, it is ordered that the prisoner be and he is hereby discharged from custody.

Dated October 5, 1854.

G. DEAN.

Justice of Supreme Court.

All of which I do hereby certify, and return as within I am commanded.

In testimony whereof I have hereunto put my hand and seal, this 27th day of October, in the year 1854.

G. DEAN, [L. S.]

R. C. Underhill, (District Attorney) for the people.

I. The judge erred in allowing the writ of habeas corpus, because

(1) The prisoner was detained by virtue of the final judgment of a competent tribunal of criminal jurisdictions; and

(2) That fact appeared from the petition itself. (2 *R. S. Pt. 3, Ch. 9, Tit. 1, Art. 2, § 36 and 40, case folios 9 to 11; 2 R. S. Pt. 4, Ch. 2, Tit. 6, Art. 1, § 5 and 13.*)

II. The judge erred in discharging the prisoner, for the reason first above stated, since the cause of the detention appeared from the return to the writ, (case folio 17,) and that cause was the final judgment of the Oyer and Terminer. (2 *R. S. Pt. 4, Ch. 2, ubi supra; Id. Pt. 3, Ch. 9, Tit. 1, Art. 2, § 55.*)

(a) The Oyer and Terminer is a competent court of criminal

The People v. Cavanagh.

jurisdiction to try and pass judgment upon all misdemeanors. (2 R. S. Pt. 3, Ch. 1, Tit. 4, § 14.)

(b) It is a Superior Court of general criminal jurisdiction, and jurisdiction of the person upon whom it passes judgment, is, therefore, presumed. (*Foot v. Stevens*, 17 Wend. 483; *Hart v. Seixas*, 21 Wend. 40; *People v. Nevins*, 1 Hill. 154.)

III. A competent court having jurisdiction of the subject matter of a cause, and of the parties to it, and proceeding to pass judgment therein, is legally competent to pass any judgment, which under any circumstances, the court is authorized to pronounce; and, although its judgment be erroneous, it can not be reversed, vacated, superseded or evaded by a judge at chambers or elsewhere; but only by a competent court, proceeding according to the prescribed legal forms, judicially to review it. (*People v. Nevins*, 1 Hill, 154; *Bl. Comm. Bk. 4*, p. 391-2.)

IV. The defendant's remedy for any error of the court in this case, is by writ of error, and not by writ of *habeas corpus*. (2 R. S. Pt. 4, Ch. 2 Tit. 6, Art. 2; *Bl. Comm. Bk. 4*, p. 391-2; 3 Hill, 662.)

V. The orders made by Justice Dean, allowing the writ of *habeas corpus*, and discharging the defendant from custody, should be reversed and set aside; and the defendant should be remanded to the custody of the sheriff of Kings county, to be by him detained pursuant to the sentence of the Oyer and Terminer.

King Hadden & McCue, for defendant.

1st. The commitment does not show the particular offence designated as a misdemeanor, nor the conviction to have been of an offence for which defendant might be adjudged to be imprisoned; certain offences declared to be misdemeanors, being punishable by fine alone, others by fine and imprisonment, others by fine or imprisonment, and others by imprisonment alone.

The People v. Cavanagh.

2d. The defendant was adjudged upon said conviction to imprisonment in the common jail of the county of Kings, for the period of thirty days, &c., when he should have been sentenced, if at all, to the county penitentiary.

3d. Upon the grounds aforesaid said commitment is void.

By the Court, BROWN, J.—Error committed by a criminal court, having jurisdiction of the offence and the person of the prisoner, can not be reexamined upon *habeas corpus*. Whether the error occurred at the trial, or is alleged to exist in the judgment rendered, the only remedy is by *certiorari* or writ of error. When it is alleged that the prisoner is in custody by virtue of legal process, the existence of the process and its validity upon its face become a legitimate subject of inquiry; but there can be no reexamination of any matter which occurred anterior to the judgment, and warrant of commitment. Matters which entitle a prisoner to his discharge, such as the expiration of the period of time for which he was sentenced, a reversal of the judgment, an executive pardon, or the payment of the fine imposed upon him as a punishment, are subjects upon which the officer issuing the writ may hear proof and when established, constitute good cause for the prisoner's discharge. "When the imprisonment is under process, valid on its face, it will be deemed *prima facie* legal, and the prisoner must assume the burthen of impeaching its validity by showing a want of jurisdiction in the magistrate or court where it emanated. If he fail in thus impeaching it, his body is to be remanded to custody. Error, irregularity, or want of form, is no objection. Nor is any defect which may be amended or remedied by further entry or motion." (3 *Hill*, 661, note, 31; *The People v. Nevins*, 1 *Hill*, 154; *Case of the Sheriff of Middlesex*, 11 *Adolp. & Ellis* 273; *The People v. Cassels*, 5 *Hill*, 164.)

Courts of Oyer and Terminer are courts of superior criminal jurisdiction, having power: 1. To inquire by the oath of good and lawful men of the same county, of all crimes and misdemeanors committed or triable in such county: and 2d, to hear

The People v. Cavanagh.

and determine all such crimes and misdemeanors. (2 R. S. 2d ed. p. 132, § 29.) It is apparent therefore, that the court of Oyer and Terminer of the county of Kings, had jurisdiction over the offence of which the prisoner, Cavanagh, was convicted, and its jurisdiction over his person will be presumed. In *Hart v. Seixas*, (21 Wend. 40,) the record did not show that the court below had acquired jurisdiction by the service of process, or the appearance of the defendant, and it was held that a court of general jurisdiction is not bound to show the regularity of its proceedings expressly, but that every thing necessary to confer jurisdiction over the person of the defendant would be presumed. The learned justice who delivered the opinion quoted with approbation the rule to be found in *Peacock v. Bell*, (1 Sand. 73,) "that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so, and nothing shall be intended to be within the jurisdiction of an inferior court, but that which is expressly alleged." (*Vide also Foot v. Stevens*, 17 Wend. 483,) It appeared by the return to the writ of *habeas corpus* in this proceeding, and also by the petition upon which it was granted, that the prisoner John Cavanagh was in the custody of the sheriff of the county of Kings, in the county jail, by virtue of a commitment, being an extract from the minutes of the court duly certified by the clerk, which expressed, that at a court of Oyer and Terminer holden in and for the county of Kings, on the 12th day of September, 1854, before the Hon. W. ROCKWELL, one of the justices of this court, HENRY A. MOORE, county judge, NICHOLAS STILLWELL and SAMUEL STRIKER justices, &c., John Cavanagh was convicted of misdemeanor, "whereupon it was ordered and adjudged by the court, that the said John Cavanagh for the misdemeanor aforesaid, whereof he is convicted, be imprisoned in the common jail of Kings county, for the term of thirty days, and pay a fine of \$250, and in default of the payment of such fine, he be imprisoned for a further term not exceeding six months." The return was not traversed except so far as to deny the sufficiency of the commitment to detain the prisoner in custody. The 42 section of

The People v. Cavanagh.

the act concerning writs of *habeas corpus*, &c. (2 R. S. 469, 470,) directed that if the return show that the prisoner is detained in custody "by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree," it shall be the duty of the officer before whom the proceedings are had forthwith to order the prisoner to be remanded. The authority for the form of the commitment upon which Cavanagh was detained, is to be found in the 5th section of the act concerning judgments, &c., in criminal cases, (2 R. S. 618,) which requires the clerk "whenever a judgment, upon any conviction, shall be rendered in any court, to enter such judgment fully in his minutes, stating briefly the offence for which such conviction shall have been had." Section 11 of the same act provides that a transcript of the entry of such conviction, duly certified by the clerk, shall be delivered to the sheriff which shall be sufficient authority for him to execute such sentence, which he shall execute accordingly." The learned justice, before whom the proceedings under review were had, made an order that Cavanagh be discharged from his imprisonment, upon the ground that the transcript of conviction was not evidence of the final judgment of a competent court of criminal jurisdiction, because no offence was stated. The entry asserts that the prisoner was convicted of misdemeanor, and the court thereupon adjudged that "for the misdemeanor aforesaid, whereof he is convicted, he be imprisoned, &c." "The misdemeanor aforesaid whereof he is convicted," is the offence particularly set out in the indictment, and whenever the record was made up in pursuance of the fourth section of the act last referred to, it would have disclosed the particular acts which constituted the crime, and the nature and character of the misdemeanor of which the prisoner was convicted. In the transcript of the conviction, the crime is briefly stated as a misdemeanor, which is precisely what the act requires. No other term could have been employed more apt and significant. Besides, it has been shown that the want of form is no objection, nor is any defect or omission which may be supplied or

The People v. Cavanagh.

remedied by further entry or motion. In *The People v. Nevins*, the rule upon which the defendant was committed for a contempt, was quite as brief and inexplicit as the entry in the present case. The court say, "the sum for the nonpayment of which a man is committed for contempt, should no doubt be specified by the rule; but that may be directly, or by reference to a proceeding taken to ascertain the amount through the proper officer, whose report, on its being filed and confirmed, becomes the act of the court and is then to be read as part of the rule. *Id certum est quod certum reddi potest.*" For illustration the court refer to "the little slip called a bail piece, on which a man may be arrested, and under a short committitur endorsed by a judge, incarcerated, either before or after judgment, at the pleasure of his manucaptors. So in this case, if it became material to know of what particular misdemeanor the prisoner was convicted, in order to determine that the commitment was legal, resort might have been had to the record, if one had been made up and filed, and if not, to the indictment upon which he was tried and convicted, and to which the entry in the minutes referred. But no resort to the record or the indictment, was necessary to give effect to the entry as evidence of a conviction for a crime. It expressed that the prisoner is convicted of misdemeanor, and for the misdemeanor aforesaid, whereof he is convicted that he be imprisoned, &c. At the common law, the term misdemeanor is generally used in contradiction to felony, and misdemeanors comprehend all indictable offences which do not amount to felony, (4 *Black. Com.* 5.) There are, it is true, a numerous class of offences, acts of omission and commission, which are specially declared by the statutes to be misdemeanors. There is also a general provision, section 45 of the act concerning offences punishable by imprisonment in the county jail by fines, (2 *R. S.* 582,) which declares "that when the performance of any act is prohibited by any statute and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition, or in any other section or statute, the doing such act shall be deemed a misdemeanor." Section

The People v. Cavanagh.

46 prescribes the punishment for such misdemeanor, which is imprisonment in the county jail not exceeding one year, or by fine not exceeding \$250, or by both such fine and imprisonment. A misdemeanor is therefore a distinct and well defined offence, with its appropriate punishment declared by the statute. It was no more necessary in the entry of the conviction and sentence upon the minutes of the court, to state or to refer to the particular facts which constitute the misdemeanor, then it would have been to set out or refer to the particular acts which constituted the murder, manslaughter or larceny, had the prisoner been convicted and sentenced for either of those crimes. The offence is described in the entry by the name and designation given to it by the law, and that was all that could be required. Let us suppose (what I understand was actually the case,) that Cavanagh was one of the commissioners of excise of the city of Brooklyn. That he united with his co-commissioners in doing some of the acts prohibited by the law concerning excise, and the granting of licenses. And for this breach of public duty he had been indicted by the grand jury and convicted at the Oyer and Terminer. His offence would have fallen within the general provision of section 45 of the act concerning offences, punishable by imprisonment in the county jail and by fine. It would have been a misdemeanor, and by no other name could it have been appropriately and legally designated in the entry of the conviction and sentence.

I therefore conclude that in making the order for the discharge of Cavanagh from his imprisonment, the learned justice erred. The moment it appeared that he was in the custody of the sheriff upon the conviction, and in execution of the sentence mentioned in the return, the injunction of the 42 section of the act concerning writs of *habeas corpus*, &c., because positive and peremptory, and he should have been remanded.

There is no force in the point raised that Cavanagh should have been sentenced to the penitentiary and not to the county jail. We must assume that the Oyer and Terminer determined it had the power to pronounce the sentence under which he was imprisoned. If it was an error to designate the county

The People v. McMahon.

jail as the place of his confinement, (which I by no means assert,) it can not be reviewed and corrected in this proceeding. It forms no ground for his discharge upon *habeas corpus*.

The proceedings reversed and the prisoner remanded, &c.

SUPREME COURT. Albany General Term, December, 1855
Parker, Harris and Watson, Justices.

THE PEOPLE vs. ARTHUR McMAHON.

Where a juror has been challenged *for favor*, and evidence of circumstances in support of the challenge has been received and submitted to the triers, without objection, it belongs to the triers and not to the court to decide whether the juror stands indifferent between the parties; and in such case the court, in charging the triers, should not instruct them how they ought to find on that point. *Per* WRIGHT, J. at the Oyer and Terminer.

Where incompetent evidence has been received without objection, under a misapprehension on both sides, as to the facts on which its admissibility depended, a motion to strike out such evidence may be made at any subsequent stage of the trial, when facts shall have been proved which render it incompetent.

On the trial of a party for the murder of his wife, where it appeared that the prisoner was examined as a witness before the coroner's inquest and that he had been previously arrested for the murder, by a constable, without warrant and was under arrest at the time of his examination as a witness, though the fact of his arrest was not known to the coroner, but was a separate and independent proceeding, it was held competent to prove what the prisoner testified to before the coroner's jury.

Evidence given under such circumstances will be deemed voluntary because the witness has the right to refuse to answer any question tending to criminate himself.

This was a writ of error to the Rensselaer Oyer and Terminer. The prisoner was charged with the murder of Elizabeth McMahon, his wife. A plea of not guilty having been interposed to the indictment, the cause came on to trial on the 19th day of February 1855, before Mr. Justice Wright and the justices of the Sessions.

The People v. McMahon.

After Thomas Harthorn and Nairn Burgess had been called and sworn as jurors, Sylvester was drawn as a juror and was challenged by the counsel for the prosecution for favor. The said Harthorn and Burgess were then sworn as triers. At the request of the counsel for the prosecution said Cummings was then sworn and examined as to his fitness and qualification as a juror and testified as follows: "I live in North First street near Jay street in the city of Troy, about twenty feet from where the prisoner lived at the time of the death of his wife. I was home from my store about 10 o'clock of the evening of her death, and was not home after 6 o'clock of that evening until that hour. I had known the prisoner for about two years prior to that time. He was an occasional customer of mine. I was not present at the coroner's inquest. I was in prisoner's house the next day but one after the disappearance of his wife, and was a witness before the grand jury in this matter, and am subpoenaed here as a witness, but can not say in whose behalf. I have conversed about this matter, but have expressed no opinion as to the guilt or innocence of the prisoner. I have no tendency to one belief upon the subject more than the other. I have formed no opinion upon the subject. I am an Irishman by birth, and judge from prisoner's conversation that he is an Irishman. I can not say and have no belief as to the religious faith of the prisoner. I never saw him at the church where I worship. I can not remember the day of the week when this woman was last seen. I was sworn before the grand jury in this matter and testified. I have no bias in favor or against the prisoner in this matter."

The counsel for the prisoner then and there insisted before the said triers, and requested the court to charge them that the evidence showed that said Cummings was a legal and competent juror in the case; but the court refused so to charge, and the said triers found and decided upon the evidence aforesaid that the said Cummings was not indifferent between the parties and he was rejected, to which refusal, finding and rejection, the counsel for the prisoner duly and severally excepted.

It appeared on the trial that the prisoner, if guilty, must

The People v. McMahon.

have committed the offence on the 8th of September, 1854, between nine and ten o'clock in the evening. On the 9th of September, 1854, a coroner's inquest was held, upon which the prisoner was sworn as a witness. The testimony given by the prisoner before the coroner's inquest was proved on the trial, without objection, by the evidence of Doct. *Reed B. Bontecou*, the coroner. At the time this evidence was received it did not appear that the prisoner had been arrested at the time he was examined before the coroner's inquest. At a late stage of the trial *Charles R. Squires*, a witness called by the prosecution, testified, that he was, and had been, for several years, a constable; and that on the 9th of September, 1854, before the coroner's inquest was held, he arrested the prisoner without warrant, on suspicion that he was guilty of the supposed murder. That the prisoner continued under such arrest till after he had been examined before the coroner's inquest, when Squires took him to the office of Justice Brintnall and that while Brintnall was making out a warrant the coroner sent for the prisoner and made out a warrant on which he was taken to jail.

The prisoner testified before the coroner's jury that he was at home at nine o'clock on the evening of the 8th of September. This was important to meet a defence set up that the prisoner was absent from seven till ten o'clock.

The jury found the prisoner guilty and he was sentenced to be executed on the 27th day of April, 1855.

Annexed to the bill of exceptions were affidavits on which the prisoner's counsel asked for a new trial on the ground of newly discovered evidence.

W. A. Beach, for the prisoner.

I. The court erred in holding the testimony given by the prisoner before the coroner, competent evidence against him.

1. Although the evidence was taken without objection, the question as to its admissibility was properly before the court. It was admitted under the misapprehension *upon both sides* that

The People v. McMahon.

that there had been no arrest at the time. Doct. Bontecou, the coroner, had testified that the prisoner was arrested after the verdict on the inquest. The question upon the evidence was raised and considered by consent, without regard to its timeliness. The people can not therefore here object to its consideration.

2. The arrest of the prisoner by Squires was regular and lawful. A felony had been actually committed and reasonable grounds of suspicion existed against the prisoner. (3 *Wend.* 350; *Barbour's Cr. Law*, 543.)

3. The testimony of the prisoner while under such arrest was inadmissible against him. He was under the duress of the law. He testified under the compulsion of a legal proceeding. (*The People v. Hendrickson*, 9 *How. Pr. R.* 155; 8 *ib.* 402.)

(A) The prisoner stood before the coroner as an arraigned criminal. He was accused of the crime under examination, before an officer competent to investigate and commit. His examination should have been without oath and with information that he was at liberty to refuse to answer any question put to him. (2 *R. S.* 708.)

(B) Should it be thought that the provisions last cited are technically inapplicable to proceedings before a coroner, the latter are, nevertheless, obviously within their spirit. It is the charity of the law in all cases of charge and arrest, to protect the accused from all persuasion, or obligation to criminate himself.

(C) The exclusion of this character of testimony is not placed entirely upon the notion of self-crimination. It is a concession to the infirmity of the mind when overcome by heavy calamity and confused by the conflicting emotions, incident to a criminal accusation. (2 *Greenleaf on Ev.* § 214.)

(D) The prisoner was undoubtedly convicted, upon the declaration in his evidence before the coroner, that he was at his house, at nine o'clock of the evening of the murder. It was conceded on the trial, that the crime was committed (if at all at the house of the prisoner,) between 9 and 10 o'clock at

The People v. McMahon.

night. The prisoner had proven an *alibi* by two unassailed witnesses. He could have been convicted therefore only upon his confession that he was at the scene of the crime, at the time of its commission.

II. The prisoner is entitled to a new trial upon the ground of newly discovered evidence.

M. I. Townsend, for the people.

I. There was no error in the proceedings, or the finding of the triers, on the challenge to Sylvester Cummings as a juror. The evidence to sustain the challenge was submitted to the triers without objection. It consisted of the facts: 1. That the plaintiff in error and the juror were neighbors and friends. 2. The former was a customer of the latter. 3. The juror had been a witness before the grand jury, and was in attendance upon subpœna. He was a witness to many of the circumstances of which the case was made up.

The submission of the evidence to the triers was not objected to. The exceptions were to the refusal of the court to charge the triers as requested and the finding by them. And though formally two-fold were substantially the same: *First*, that the court refused to charge that they should find that the said Cummings was a legal and competent juror, and *second*, that the triers did not so find.

1. It was neither the duty nor the right of the court to so charge. (*The People v. Bodine*, 1 Denio, 308; *Same v. Honeyman*, 3 id. 124; *Same v. Freeman*, 4 id. 31.)

In the last case cited the court charged substantially as requested in this case. It was held erroneous and on that ground a new trial was granted. It was put upon the ground that the province of the court ended in determining what evidence was admissible, and that its strength and influence were for the triers alone to determine.

2. The finding of triers is conclusive and is not even subject to review. Where there is evidence submitted to triers and they are properly instructed, there is no appeal from their decision.

The People v. McMahon.

See authorities above cited. In *Com. v. Jolliffe*, (7 *Watts* 585,) it was held to be principal cause of challenge on the part of the commonwealth, that the juror had been subpoenaed as a witness by the prisoner.

It is a good ground of challenge to a person summoned to serve as a grand juror, that he is a witness on the part of the prosecution. (2 *R. S.* 724, § 27; *Whart. Amer. Cr. Law*, 961, 971; 4th *Wend.* 229-19, *Johns. Rep.* 115, 119.)

II. There was no error in denying the motion to strike out the testimony of the prisoner given before the coroner's jury. The question presented by this exception, was decided in the *Hendrickson* case. The motion to strike out was founded not on the ground, that when the evidence was given he had been arrested, not on the ground that the statement was made under oath, but on the ground of the concurrent effect of the two. Now if it appears that either of those acts formed no material element of the legal proposition the whole objection fails.

1. That the prisoner had been arrested when the statement was made, did not effect the admissibility of his statements.

This was not put upon the ground that all his admissions made after this arrest were inadmissible.

2. Whether he was, or was not under oath when the statements were made, was not material as to the question of admissibility. That was understood when the statements were read in evidence and was not made ground of objection.

3. The concurrence of the arrest and the oath were not material. It is only when a prisoner is brought before a magistrate upon a charge of crime, and examined as a party to the proceedings and not as a witness, that the oath or the arrest becomes material; statements there made are *judicial* confessions and must be conducted according to the statutory requirements or they are not admissible in evidence against the party making them.

In this case he was examined as a witness, and of course his examination was conducted as in ordinary cases of witnesses, and he had the power of making every explanation which he chose to make as well as to avail himself of the

The People v. McMahon.

privilege of not answering if he deemed that his answer might criminate himself.

4. There was nothing in the circumstances surrounding him to take his statements out of the general rule that what a party has said relevant to the accusation upon which he is being tried is admissible in evidence against him. There were no inducements by means of threats or promises. His testimony was voluntarily given and seems to have been intended to avert suspicion from himself. *The People v. Hendrickson*, 8th Howard Pr. Rep. 405-7; 9 ib. 163-4; 1 Parker's Cr. Rep. 396, &c.; *People v. Knapp*, 10 Pick. R.; *People v. Whipple*, 9 Cowen, 707; 2 R. S. 708.)

The remaining points related to the alleged newly discovered evidence.

By the Court, PARKER, P. J.—It was proved at the trial that the prisoner was examined as a witness before the coroner's inquest, held on the day after the alleged murder. The testimony that he gave on that occasion was proved without objection. At a later stage of the trial, it was shown that, previous to the sitting of the inquest and on the same day, the prisoner had been arrested by one Squires a constable, without warrant, and was under arrest at the time of his examination. The prisoner's counsel then moved to strike out the evidence given in his testimony before the inquest, which the court refused to do.

It was not too late to strike out the evidence, if it was incompetent. It was received without objection, under the supposition on both sides, that the prisoner was not under arrest at the time of his examination as a witness. It was in time to make the objection, when the fact appeared on which that objection was based. The question must therefore be decided as if the objection had been made to the admissibility of the evidence before it was received.

This subject has been so recently and so fully examined in the case of *The People v. Hendrickson* (1 Park. Cr. R. 416,) that nothing new can be gleaned from a further review of the authorities. Upon principle, there can be no good reason

The People v. McMahon.

for the exclusion of this evidence. It is only upon a *judicial* examination, where the prisoner is brought before a magistrate charged with crime, that the accused is to be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him. (2 R. S. 708, § 15.) He is to be examined, but not on oath; and his answers may subsequently be used as evidence against him. That is the examination of a party and not of a witness.

In the examination of a witness, a different rule prevails. In that case the witness is to answer, unless he objects that his answer will tend to criminate him. If he makes that objection, he will not be compelled to answer. But if he does answer, his testimony may be given in evidence, afterwards, against him.

There is no hardship in this rule, nor is there any necessity for making any exceptions to it. It places all witnesses upon the same footing. The protection is the same, whether the witness be examined in a civil or a criminal suit, or on a general enquiry, before a grand jury or a coroner's inquest. In all these cases, a suspected person is liable to be called and examined, though he can not be, where he is a party to the proceeding.

This case differs a little from *Hendrickson's* case, but not in principle. There the witness was said to have been under suspicion at the time of his examination before the coroner; here he was under arrest. But he was not under an arrest made by order of the coroner, nor was he before the coroner as a prisoner. The coroner had no instrumentality in causing his arrest, nor had he even any knowledge on the subject. The constable, Squiers, without warrant, but supposing there were reasonable grounds for suspicion, had arrested the prisoner. After such arrest and before he was brought to Brintnall, the justice of the peace, before whom Squiers was proceeding to take him, the inquest was held before the coroner, as a separate proceeding, and at that inquest, the prisoner, being present, was called and examined as a witness.

Under such circumstances, McMahon was not before the

The People v. McMahon.

coroner, as a prisoner, but as a witness. It does not appear that any person knew of his arrest except Squires. In regard to the coroner's proceeding, he stood, in no respect, in the relation of one arrested or even accused. He was there only in the capacity of a witness and it is as such, and not as a party, that his legal rights are to be determined.

It will not be claimed that it was improper to examine him on oath. The fact that he had been arrested, in a different proceeding, and by an officer in no way connected with the inquest, could not certainly disqualify him from testifying at the inquest. He was a competent witness. He was bound to know his legal rights. Like every other witness, he might refuse to testify; but if he did answer, he was bound to tell the truth at his peril. He was bound by his answers, and responsible for their truth. It will not be controverted, but it was proper to take his testimony into consideration in making up the inquest and that, for that purpose, it would be deemed voluntary. Upon what principle can it be deemed involuntary, when it is sought to be referred to as an admission, available in some other proceeding? It can not surely be voluntary for one use and involuntary for another.

It is said that being under arrest at the time of his examination, "his mind was overcome by a heavy calamity and confused by the conflicting emotions incident to a criminal accusation." Such a state of his mind might well be produced without an arrest. It would more naturally be the result of the criminal act itself, than of an arrest for the act. A troubled conscience would produce just such emotions. And with the more hardened, and even with the innocent, such feelings might arise from the distrust exhibited by those around him, without any overt act towards making an arrest. No practicable rule could be adopted which would exclude evidence on the ground that the mind of the witness was "confused by conflicting emotions." The only available way is to receive the evidence and judge of it by the character it exhibits. This puts all competent witnesses upon the same footing and applies to them the same rules of evidence.

The People v. McMahon.

Suppose, while McMahon was under arrest and on his way to the magistrate, he had been called as a witness in a civil suit against a third person, for damages, in which it might be material to enquire into the cause of the death of the deceased. Is there any doubt but he would have been a competent witness, and obliged to answer all relevant questions asked him, unless he should claim his privilege not to criminate himself? No one I think will question it. His answers then would have been evidence in the civil suit, and would be deemed voluntary. If, in such case, he does not claim his privilege, he will be considered as willing to criminate himself, and there can be no doubt what he testifies to may be used for that purpose afterwards. It is because it may be so used, and to avoid such a consequence that he may refuse to answer. If such use could not be made of it, there would, in no case, be any necessity for making a claim of privilege.

If it would have been competent to prove what was stated under oath by McMahon in a civil suit, it was equally competent to prove his testimony before the coroner. If he was under arrest and was examined to the same subject matter, it could make no difference to him whether he was examined in a civil suit, or on a coroner's inquest or grand jury, or even on a trial of another person for crime. If the arrest was in no way connected with the tribunal or proceeding in which he was sworn, he could not be considered as acting or speaking under any more compulsion than is always supposed to be imposed upon a witness, viz., to testify and to tell the truth; and even that compulsion ceases, in all cases, when a question is asked, the answer to which may tend to criminate the witness. If a witness answers in any case as to such a matter, it will be because he voluntarily elects to do so.

I think the evidence excepted to was properly received.

Relief is also asked on the ground of newly discovered evidence and affidavits are laid before us, with a view of showing that important evidence has been discovered since the trial. No such ground is available on writ of error. We can only review the legal questions growing out of the trial and reverse for any

The People v. Mack.

error that may be found to have been there committed. For any mistake of fact, or for any relief on the ground of the discovery of new evidence, the party can only look to the tribunal in which the issue was tried. The power of the Oyer and Terminer to grant a new trial on the merits has been ably, and I think conclusively, vindicated, by one of my learned associates in *The People v. Morrison* (1 *Park. Cr. R.* 625). At all events, no such power is vested in the appellate tribunal.

The judgment of the Oyer and Terminer must be affirmed and the sentence pronounced is hereby directed to be executed. (2 *R. S.* 741 § 24.)

Judgment affirmed.

DUTCHESS SPECIAL TERM, November, 1854. Before *Dean*,
Justice.

THE PEOPLE vs. FRANK MACK

A new trial will not be granted on the ground of newly discovered evidence, where such evidence might have been procured by ordinary diligence. Nor will a new trial be granted on the ground of surprise, where the party becomes surprised after the rendering of the verdict.

This was an action on a recognizance, taken by a justice of the peace, before indictment, for the appearance of one Smith at the June Oyer and Terminer in the county of Dutchess. On the trial, the plaintiff called the county clerk as a witness, who testified that there was a court of Sessions, with a grand jury, between the taking of the recognizance and the June Oyer and Terminer. Judgment was given for the defendant, on the ground that the recognizance was void for not having required the prisoner to appear at the next criminal court having jurisdiction of the offence charged. The case was reported in 1 *Park. Cr. R.* 567.

The plaintiff now moves for a new trial on the ground of newly discovered evidence and surprise. It was shown by affi-

The People v. Mack.

davits that although a grand jury did attend the May Sessions, yet, that the order requiring such attendance was not made until April, while the recognizance was taken in March. It also appeared that this circumstance was unknown to the attorney and counsel for plaintiff.

Dodge & Campbell, for the people.

J. F. Barnard, for the defendant.

DEAN, J.—This testimony is material, because, if true, and if it had been produced, the plaintiff would have been entitled to judgment. Nor is it cumulative within any legal signification of the term. The application is not open to objection on either of these grounds and raises distinctly the question, whether a party can ever obtain relief, by motion for a new trial, when he discovers that evidence within his reach, and of which by ordinary diligence he might have availed himself on the trial, would change, or probably change, the result.

The answer, in this case, fully apprized the plaintiff of the nature of the defence. By that, it was evident that if no grand jury had, in March, been appointed to attend the May Sessions, there was nothing in the point taken, that the recognizance should have required the appearance of the prisoner at that court. The evidence of the time when the order was made was within the court house, and could have been obtained at any time by an examination of the papers on file. The plaintiff might have required the defendant to produce the original order of the county judge, instead of giving parol evidence of the fact. The case, however, was tried—no objection was made to the manner of proving the regularity of the court, &c.; but now, on discovering the materiality of the testimony, an application is made for a new trial, to enable the plaintiff to supply that which was within his reach at the time of the trial. No excuse whatever is given for the want of information on this very material point, nor does it appear in what manner it has since been discovered. Independently of adjudged cases, it seems to me, to allow a party to have a new

The People v. Mack.

trial on such grounds, would be, if not offering a premium to negligence, putting negligence and inattention on an equality with care and vigilance, and would fill the courts with applications of this nature.

But I am not left to pursue my own opinions in this case. The whole current of decisions is in one direction. Ch. J. Parsons in *Bond v. Cutler* (7 Mass. R. 205,) says: "Want of recollection of a fact which, by due attention, might have been remembered can not be a reasonable ground for granting a new trial; for want of recollection may always be pretended and may be hard to be disproved." In *Knox v. Work* (2 Binn. 582) Rush says: "It is laid down as a general principle, and is said to be an established rule, not to grant a new trial on account of evidence discovered after the trial, which by using due diligence, might have been discovered before, or which it was in his power to have been furnished with." I most fully concur with this salutary rule. By rigidly enforcing it, vigilance on the part of both attornies and parties will be in requisition, an end will be put to much unnecessary litigation, and courts will be saved from trying causes twice, which could as well be tried on the first hearing. The rule, as I have here held it, is stated quite as rigidly in *Graham on New Trials* 473 and has always been recognized by our Supreme Court.

The other ground that was urged on the argument for granting this motion — surprise — has no existence in fact, because the plaintiff was apprized of the defence by the answer. But on this ground, it is obnoxious to the same objection, as on the ground of newly discovered evidence. A plaintiff has no right to be surprised by evidence within the issues. If, however, he is, he must find out this surprise at the trial and he can then apply to the court for leave to withdraw a juror, or submit to a non-suit. But he can never, after having submitted his cause, on finding that the verdict or judgment is against him, become surprised, and ask the court to relieve him from an error, mistake or omission. (2 W. Black. 802; 4 Taunton 779; 5 Wend. 127; *Graham on New Trials*, 191.)

The motion must be denied, with costs.

SUPREME COURT. Jefferson General Term, April, 1856.
Pratt, Bacon and Allen, Justices.

JOHN H. KLOCK pl'ff in error *vs.* THE PEOPLE def'ts in error

Where, on a trial for a felony, after the public prosecutor has entered upon his case and given evidence to the jury, he finds himself unprepared with the proper evidence to convict, and obtains leave of the court to withdraw a juror, and thus arrest the trial, such withdrawal not being the result of improper practice on the part of the defendant or any one acting with or for him, or of any overruling inevitable necessity, the defendant can not be again put on trial for the same offence.

The objection to a second trial in such a case, does not rest upon the constitutional provision that no person shall be subject to be twice put in jeopardy for the same offence; that provision is a protection only where there has been a conviction or acquittal by the verdict of a jury, and judgment has passed thereon and does not apply to a case where the jury have been discharged without giving any verdict or where judgment has been arrested.

But the objection lies back of the constitution and rests upon the principles of the common law, which are essential to the protection of the accused, by securing him a speedy and impartial trial and the best means of vindicating his innocence.

Whether the same rule applies to trials for mere misdemeanors, *quere?*

The decision in the case of the *People v. Ellis*, 15 *Wend. R.* 371, doubted.

The practice to be adopted in bringing up the question in such a case, discussed.

This was a writ of error to the Jefferson county Sessions. The plaintiff in error was indicted in the court of Sessions of Jefferson county, for the crime of arson in the third degree. At the February term of that court (1853,) a jury was impaneled for the trial of the indictment upon the plea of not guilty, and evidence given of the offence and of circumstances tending to establish the guilt of the accused. Towards the close of the evidence on the part of the prosecution, the court upon the objection of the counsel for the prisoner, ruled that a certain fact sought to be proved by the public prosecutor could only be proved by record evidence and excluded the evidence in that behalf offered, whereupon on motion of the district attorney without the consent and against the objection of the accused, a juror was withdrawn and the jury discharged.

Klock v. The People.

At the ensuing June term, the district attorney again moved the trial of the indictment, and the defendant set up by way of plea the foregoing facts in bar of the further prosecution of the indictment upon demurrer; the plea was holden insufficient in law and the defendant brings error to this court.

John Clarke, for plaintiff in error.

J. F. Starbuck, (District Attorney) for the people.

I. The objection to the trial of a prisoner after one trial has been commenced, and a juror has been withdrawn, rests solely upon the provision in the constitution of this state in these words:

“No person shall be subject to be twice put in jeopardy for the same offence.” (*Const. of N. Y. art. 1, § 6.*)

II. The true signification of the above constitutional prohibition is that *after verdict* no person shall be subjected to a second trial for the same offence.

“That no man is in *jeopardy* until verdict rendered, has been held by the Supreme Court of the United States, by Washington, J., Story, J. and McLean, J., sitting in their several circuits, and by the courts of Massachusetts, New York, Illinois, Kentucky and Mississippi.” (*Whart. Amer. Cr. Law*, 209; *U. S. v. Perez, Wheaton*, 579.)

III. If the trial of a prisoner, after the withdrawal of a juror, is prohibited by the above constitutional provision, then the discharge of a jury on disagreement, or for any other cause, must be a bar to a future trial. That such discharge does not constitute a bar, has in repeated instances been expressly held by the highest judicial tribunals in the country. (*Whart. Amer. Cr. Law*, 209, 10, 212; *Com. v. Bowden*, 9 *Mass.* 494; *Com. v. Purchase*, 2 *Pick.* 521; *People v. Goodwin*, 18 *J. R.* 187; *People v. Olcutt*, 2 *John. Cases*, 301.)

IV. The constitutional prohibition against putting a person twice “in jeopardy,” has no application except to cases where the facts are such as to sustain the technical plea of *autrefois*

Klock v. The People.

acquit or *autrefois convict*. This plea is applicable only in cases of *verdict* or *judgment*, and must be supported by the *record*. In this case there is no verdict, no judgment, no record, and none is alleged in the plea. The plea is therefore bad, and the demurrer was properly sustained.

If we ascertain what is necessary to constitute at common law, a good plea of *autrefois acquit* or *autrefois convict*, we shall have what constitutes a complete defense under this clause of the constitution. It is not, therefore, possible to support the defence of a former acquittal, by anything short of a final judgment or verdict. The accused can not with any propriety rely on the discharge of the former jury, without any verdict either for or against him. (*Whart. Amer. Cr. Law*, 213, and cases there cited.)

“The *record* of the former indictment and acquittal must be set out in the plea, otherwise it will be bad on demurrer.” (*Archbold's Crim. Pleadings*, 90; *Gould & Banks ed. of 1846*, 109; *R. v. Wildley*, 1 *M. & Selw.* 148.)

V. The right to withdraw a juror and hold the accused for trial at a future term, is a matter, *in all cases*, resting in the discretion of the court to which the application is originally addressed, and this discretion will not be interfered with unless the appellate tribunal can see that it has been abused. This demurrer would, therefore, be upheld even were the indictment for a capital felony.

In all cases of *misdemeanor*, as distinguished from *felony*, the right is absolute, and exists as fully as it does in civil actions. (*W. Crim. Law*, 209, 10, 12, 13; *People v. Goodwin*, 18 *J. R.* 187; *People v. Olcutt*, 2 *John. cases* 301; *People v. Ellis & al.* 15 *Wend.* 371; *People v. Barret & Ward*, 7 *Caines*, *R.* 100, 304.)

VI. The indictment in this case is for a misdemeanor, and not a felony, and hence the right to withdraw a juror and hold the accused is absolute, as in a civil action.

Every person who shall willfully burn any building insured against fire, with intent to prejudice the insurer, shall be guilty of *arson in the third degree*. (2 *R. S.* 667, § 5.)

Klock v. The People.

The *attempt* is punishable by imprisonment for half the length of time. (2 R. S. 698, § 3.)

There is no *statute* in which arson is spoken of as a felony, but it is left to be classed according to the common law classification of crimes.

This crime has been supposed to be ranked amongst felonies, simply because it is punished by imprisonment in the state prison, and this impression has grown out of the careless reading of the following section:

“The term “felony,” when used *in this act*, or in any other *statute*, shall be construed to mean an offence for which the offender, on conviction, shall be liable to be punished by death, or by imprisonment in a state prison.” (2 R. S. 702, § 30.)

This is a mere *statutory definition of a word*, and by no means enacts that all offences, punishable by imprisonment in the state prison, are to be deemed felonies.

That the setting fire to one's own house is a *misdemeanor*, and not a *felony*, is abundantly established by reference to 4 *Black. Com.* 95, 96, 98, 221, 4; *see also Tomlin's Law Dictionary*, titles “*Felony*,” and “*Misdemeanor*.”

VII. The degree of punishment is no test of felony. Many *felonies* are punishable by imprisonment in the county jail only, while many *misdemeanors* are punishable by imprisonment in the state prison, and many offences are punishable in the one place or the other, in the discretion of the court.

“It seems that the Revised Statutes have not made the offence of petit larceny a *misdemeanor*; but that it still remains a *felony*, as at common law.” (*Ward v. The People*, 3 *Hill*, 396.)

Breaking jail is classed in R. S. under the head of *misdemeanors*. (2 R. S. 686, § 24.)

Selling another as a slave is declared by statute to be a *misdemeanor*, and yet it is punished by 14 years in state prison. (1 R. S. 658, § 8.)

Seduction is also made a *misdemeanor* by statute, and yet it is punished by five years in state prison. (*Sess. Laws*, 1848, *ch.* 111, § 1.)

Klock v. The People.

So in the "anti-rent" act, a riot by persons armed and disguised is called a misdemeanor, and is punished by two years in state prison. (*Sess. Laws of 1845, ch. 3, § 7.*)

The following are some of the offences punishable by fine, or imprisonment in the county jail, or state prison, in the discretion of the court, viz:

Aiding felons to escape, (2 R. S. 699, § 7.) Offences against the anti-rent act, (*Sess. Laws of 1845, ch. 3, § 7.*) Opening graves, &c., (2 R. S. 689, § 15.) Poisoning cattle, &c., (2 R. S. 689, § 16.) Obstructing railroad, &c., (*Sess. Laws 1838, ch. 160, § 1.*) Compounding felony, &c., (2 R. S. 689, § 17.) Receiving stolen goods, &c., (2 R. S. 680, § 71.) Breaking jail, &c., (2 R. S. 686, § 24.) Seduction, (*Sess. Laws of 1848, ch. 111, § 1.*) Selling another as a slave, &c., (1 R. S. 658, § 8.)

VIII. If the prisoner is defeated on the issue tendered by his plea, he is not permitted to deny the truth of the bill, but must appear for sentence. This is the uniform rule in all cases of misdemeanor. In cases of felony, the practice, on this point, is in the discretion of the court in each particular case. (*Whart. Crim. Law, 187, 204, 5; People v. Thayer, 3 Den. 9; Arch. Crim. Pl. 90, (110,) 84.*)

By the Court, W. F. ALLEN, J.—The objection upon which the plaintiff in error relies to the further prosecution of the indictment was not necessarily taken by plea, but might have been taken by way of exception to a second trial or by a motion in arrest of judgment; and as there has been no technical trial resulting in a verdict and judgment, on which a plea of *autrefois acquit* or *convict* can be based, it may be doubtful whether the objection can be taken by plea. It might also have been objected that the record showing merely a decision of the demurrer by the court below without a judgment upon the whole record, there was nothing before us for review upon this writ of error. But no question of form was made in the court of Sessions, and none is made here, but both parties desire an adjudication upon the question intended to be made

Klock v. The People.

without regard to the form in which it was presented below or is brought before us.

The real question is, whether it is allowable for a public prosecutor after having entered upon his case by the giving of evidence to a jury impaneled for the trial of an indictment, to withdraw a juror and thus arrest the trial so as to enable him to try the party at a subsequent time, solely because he finds himself unprepared with the proper evidence to convict where his condition is not the result of improper practice on the part of the defendant, or some one acting with and for him or some overruling inevitable necessity.

The counsel for the people appeared by the course of his very able argument, to suppose that the objections taken by the accused to a second trial rested entirely upon the constitutional provision, that "no person shall be subject to be twice put in jeopardy for the same offence." (*Art. 1, § 6,*) and if he is right in his premises, he is clearly right in his conclusion that there was no valid objection to proceeding with the trial of this indictment a second time. The judicial interpretation of a corresponding provision in the constitution of the United States is, that it prohibits a second trial of a party for the same offence, after he has been once convicted or acquitted by the verdict of a jury, and judgment has passed thereon for or against him, and it does not mean that he shall not be tried a second time if the jury have been discharged without giving any verdict, or judgment has been arrested. (*Story's Com. on Const. § 1781, U. S. v. Perez, 9 Wheat. 579.*) The state constitution of 1821, was in words a transcript of the provision of the constitution of the United States as follows: "No person shall be subject for the same offence to be twice put in jeopardy of life and limb," and was construed to include within its terms all felonies and capital offences. The only departure from this formula in the constitution of 1846 is in the omission of the limitation confining the prohibition to offences involving the life or limb of the accused. "Jeopardy of limb," in the former construction referred to offences denominated in the law felonies,

Klock v. The People.

(*Per Spencer, Ch. J., People v. Goodwin*, 18 J. R. 201,) and whether the present constitution includes parties charged with misdemeanors within the protection of this provision need not be considered.

To the extent of the provision referred to, the constitution is but declaratory of the common law, which declared that no man should be twice convicted or twice put in peril of legal penalties for the same offence, and no man could be said to be within the protection of this rule unless he could sustain a plea of *autrefois acquit* or *convict*. (*Broome's Legal Maxims*, 137; *Bouvier's Law Dict.*, tit. "*Jeopardy*.") The civil law contains the same prohibition in the maxim "*Non bis in idem*," and a party once tried and either convicted or acquitted, can not be again tried. The plaintiff in error has not been once tried so as to bring himself within the constitutional protection, as no verdict or judgment has been given. The true ground of the objection lies back of the constitution, and is found in the principles which have been deemed essential to the full and fair protection of individuals accused of crime, and to secure to them a speedy and impartial trial, and the best means of indicating their innocence. The practice and the views of courts of criminal jurisdiction upon questions somewhat analogous to that presented in this case, have passed through some modifications. Kent, J., in *People v. Olcott*, (2 J. C. 301,) refers in detail to the earlier cases bearing upon the point, and while his review of the cases shows distinctly the modification and changes which have taken place in the practice of courts, it also shows the great tenderness and care manifested by the judges for the rights of the accused and to secure to them every right essential to their defence, and an anxiety to protect them against any act or omission of the government or the public prosecutor which could injuriously affect them. They have felt at liberty to interfere and arrest a trial and dispense with a verdict from a jury once empaneled only when compelled to do so by some necessity or by some improper and fraudulent act of the accused, which would or might interfere and prevent a full and fair trial or impartial verdict. Lord Coke says: "A jury sworn

Klock v. The People.

and charged in case of life or murder, can not be discharged by the court or any other, but they ought to give a verdict." (*Coke Lit.* 227, b.; 3 *Thomas Coke*, 495.) Blackstone modifies the proposition and says: "When any evidence hath been given the jury can not be discharged (unless in cases of evident necessity) till they have given in their verdict." (4 *Black. Com.* 360.)

One case of necessity now recognized and admitted for the discharge of a jury upon a criminal trial is their inability to agree upon a verdict, and therefore it is held that a discharge for that reason will not preclude a second trial, and the court will not, upon a second trial, review the decision of the first as to the existence of the cause in the particular case under the circumstances attending it. Doubts were at one time entertained whether this discretion existed in capital cases, but it is now conceded in all cases to the same extent as in civil actions. (See *People v. Denton*, 2 *J. R.* 275; *People v. Olcott*, 2 *J. C.* 301; *People v. Goodwin*, 18 *J. R.* 187; *People v. Green*, 13 *W. R.* 55.) The *People v. Olcott* was a case of disagreement of the jury, and the decision of the court goes no farther than to hold that a discharge of the jury for that reason did not prevent another trial. In this case, Kent, J., approves the decision of Ch. J. Holt, in the case of the two *Kinlocks* (*Foster*, 27,) refusing to allow the prosecutor on finding his evidence defective to withdraw a juror and says this "was properly deemed an unreasonable and oppressive claim on the part of the prosecutor." In the *United States v. Perez*, (9 *Wheat.* 579,) it was held proper to discharge a jury because they were unable to agree in a capital case. Judge Story says the power may be exercised whenever in the opinion of the court, "taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated." In the *People v. Goodwin*, Spencer, Ch. J., says: "Upon full consideration I am of opinion that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of *extreme and absolute necessity*, and that it may be exercised without operating as an acquittal of the defendant;" and he applies the principle to a

Klock v. The People.

case of a disagreement after a faithful and protracted effort to agree, but he also says: "I entirely concur in reprobating the proceeding of withdrawing a juror and subjecting a person to a second trial because the public prosecutor was not prepared for trial," and he approves the decision in *People v. Barrett*, (2 *Caines*, 304.) In the *People v. Green*, (13 *W. R.* 55,) Savage, Ch. J., refers to the case of Barrett, and does not dissent from the principle then decided, that the discharge of a jury, because the public prosecutor was not prepared with his testimony, was equivalent to an acquittal. In the *People v. Ellis*, (15 *W. R.* 371,) the rule appears to be somewhat relaxed in the case of a misdemeanor upon the reasoning of the court in Goodwin's case. Whether even this modification was well considered or whether it should be unhesitatingly adopted, may be questionable, but the learned justice pronouncing the opinion recognizes the rule in Barrett's case, as applicable to felonies. The case of the *United States v. Coolidge*, (2 *Gall.* 364,) decides that the court may discharge a jury when a witness present at the trial refuses to be sworn. Such proceeding is necessary to prevent a failure of justice, and the necessity has not been induced by any *laches* or want of vigilance or mistake on the part of the prosecutor. The *People v. Barrett* has never been questioned and is decisive of this case, expressly denying as it does, after a very full argument and careful consideration the right of the court to discharge a jury because the public prosecutor is unprepared with his evidence, and holding that such discharge is equivalent to an acquittal of the defendant. Livingston, J., says: "To discharge a juror under such circumstances would be liable to great abuse and oppression," and the reasons why the rule should be as declared in that case are very briefly and clearly stated by the learned judge. See also 2 *Russell on Crimes*, 970, in which it is said upon the authority of *Rex v. Wade*, (*R. & M. C. C.* 86,) that if a jury are sworn, and the prisoner is put upon his trial before the incompetency of a witness of tender years for want of proper instruction is discovered, although it would have been cause for putting off the trial to give an opportunity to instruct the witness, the judge

Klock v. The People.

can not discharge the jury, but should direct an acquittal. (*See 2 C. & H. Notes, 1st ed., p. 953, in note 692.*) I have met with no case in which it is intimated that a juror may be withdrawn and a criminal trial arrested, merely because the prosecutor is unprepared with his evidence or has mistaken his case or the character of the evidence required to support it, but judges have carefully excluded this from the list of cases in which a jury may be discharged. In the case before us, if the decision of the court upon the first trial was right in excluding the evidence offered by the district attorney, it was simply a misapprehension of the rules of evidence by the prosecutor, and the result was the want of the proper preparation for trial, and this without fault on the part of the accused; and if allowable in such a case to withdraw a juror, it is difficult to say in what case it may not be done if the prosecutor finds himself unable to convict, but can satisfy the court that there is further evidence within his reach and which may produce a conviction, and the trial of an indictment may come to be but little more than a series of experiments on the part of the prosecution at the expense of the accused. It is but proper to say that the ruling of the court upon the offered evidence was erroneous, but that does not alter the principle. The law does not give a right of review on criminal trials to the people, and the district attorney can not indirectly accomplish what is directly forbidden, and least of all can he be allowed, upon an adverse decision, to arrest the trial with a view to a more favorable decision at another term or before another tribunal. The counsel for the people in a very ingenious argument sought to bring this case within that of *People v. Ellis*, by making it a misdemeanor, and insisting that at common law it was a misdemeanor, and that, as it was not denominated a felony by the statute, it was not made such by any provision of law. Perhaps upon a very literal and technical construction of the statute defining a felony, (*2 R. S. 702, § 30,*) he may be right. But the intent was to do away with the common law definition of felony as entirely inapplicable, and to substitute one which should have significance and be readily understood. (*R. Notes, 3 R. S. 836.*) I think that

Klock v. The People.

the clear intendment and proper meaning of the statute is to declare all crimes (not expressly denominated misdemeanors by statutes creating them) which are punishable by imprisonment in the state prison, to be felonies. This has been the judicial interpretation of the provision and the decisions accord with the intent of the framers and the general understanding of the profession. (*Andrew v. Dutrick*, 14 W. R. 31; *Malcom v. Lorrendge*, 13 Barb. 372; *Robinson v. Dauchy*, 3 id. 20.) (a.) But be this as it may, and conceding that the learned counsel is right, the result is the same. It matters but little by what name an offence is known in reference to the obsolete distinctions of the common law, so long as the punishment is the same, and the resulting disabilities the same, whether it be called a felony or a misdemeanor. Call it by which name you please, and the result of a conviction for arson is the infliction of an infamous punishment, and the subjecting of the party to the loss of important civil rights and serious civil disabilities, and it is in view of consequences like this, that the rule for which I contend has been established, and it has been deemed better that many guilty should escape rather than one innocent man should suffer punishment wrongfully. If in ordinary misdemeanors, the consequences of a conviction for which are not so serious, the rule of *The People v. Ellis* should apply, I should still be of the opinion that in cases of misdemeanor, punishable as felonies, a more stringent rule and one better calculated to protect a person charged with crime, from oppression and an unjust conviction, should be adhered to. The case would be within the reason of the rule applicable to technical common law felonies and therefore within the rule itself.

The decision of the court below was erroneous and must be reversed and the defendant discharged.

(a) *The People v. Van Steenberg*, 1 Park. Cr. R. 39

CORRECTION.

When it was too late to make the necessary correction in the text, the Reporter learned that the opinion of the court in the case of the *People v. Quant* had been incorrectly printed in the copy furnished him, by the omission of the words "by judicial proceedings" after the word "property" in the eleventh line on page 416 of this volume. The sentence should read as follows: "If the act or any portion of it is otherwise constitutional, the violators of such act or portion may be deprived of their property by judicial proceedings under its provisions, and it will be by due process of law."

INDEX.

A

ASSAULT AND BATTERY.

1. A husband has no right to beat his wife or to inflict corporal punishment upon her; but he may defend himself against her, and may restrain her from acts of violence towards himself or towards others. *The People v. Winters*, 10
2. On the trial of an indictment for an assault and battery in resisting the jailer, the prosecutor must produce the mittimus, to show that he had a legal right to detain him. *The People v. Muldoon*, 13
3. The principles by which a jury are to be governed, on an indictment for an assault and battery with intent to commit murder, are the same as on an indictment for murder. *The People v. Vinegar*, 24
4. Where the prisoner was the aggressor, and commenced the attack and made use of such weapons, &c., as were calculated to endanger life, it was held that malice would be inferred, and that the fact that the prisoner was in the heat of passion, would not mitigate the offence into a lesser crime. *ib*
5. Assault and battery, with intent to commit a rape, may be proved without the testimony of the person injured. *The People v. Bates*, 27
6. Where there is reason to believe that the person injured is kept out of the way by the prisoner or his friends, and the assault and battery, &c., are proved by persons who heard the cries of the woman and witnessed the transaction from a distance, the jury may infer the intent from the circumstances as proved. *ib*
7. A boy under fourteen years of age, indicted for rape, being presumed to be physically incompetent to commit the crime, can not be convicted of an assault and battery with intent to commit a rape, though he may be convicted of a simple assault and battery. *The People v. Randolph*, 213

B

BAIL.

1. On a motion to admit to bail, on an indictment for murder, upon the testimony taken before the coroner and before the grand jury, the defendants will not be permitted to furnish further proof, either by affidavits or oral testimony, tending to establish their innocence. *The People v. Hyler*, 570
2. The court in all cases, capital or otherwise, exercises its discretionary powers to admit to bail, when upon examination of the testimony under

which the accused is held, the presumption of guilt is not strong; and the court is particularly called upon to bail in all cases, where the presumptions are decidedly in favor of the innocence of the accused. *ib*

BIGAMY.

1. Bigamy is not punishable as an offence against this state, unless the second marriage took place within the territorial limits of this state. *The People v. Mosher*, 195

2. Where the prisoner married a wife in Pennsylvania, and lived with her in that state for several years, and then left her and went to Canada, and there married another woman and came to reside with her in this state, his wife being still living in Pennsylvania, it was held that the bigamy complained of was not an offence against the laws of this state and the prisoner was acquitted. *ib*

3. The statutory provision (2 R. S. 688, § 10) merely regulates the venue or place of trial, and does not enlarge the jurisdiction of the state courts. *ib*

BILLS OF EXCEPTIONS.

1. Bills of exceptions in criminal cases where unknown to the common law. They are given by statute, and their office is to bring up for review questions of law decided at the trial. They are limited to exceptions taken on the trial of the *main issue*, and are not available as to decisions made on the trial of preliminary, or collateral questions. *Wynehamer v. The People*, 377

Decisions made on a motion to quash an indictment on the grounds of irregularity in organizing the grand jury, and on the trial of an issue joined on a challenge to the array of jurors, are not reviewable on a bill of exceptions. *ib*

BLASPHEMY.

1. A prisoner can not be convicted on an indictment for blasphemy, on his mere confession made out of court, that he had made use of the words charged in the indictment; the prosecutor must also show that an offence had been committed, or that blasphemous words had actually been uttered.

Intoxication is no excuse on an indictment for blasphemy. *The People v. Porter*, 14

BURGLARY.

1. Where, on a trial for burglary, the articles of property alleged to have been burglariously stolen were found in the possession of M., an alleged accomplice of the prisoner, and were brought to the prosecutor and identified by him, proof of the confession of the prisoner that he and M. went to the house of the prosecutor together, and that the prisoner waited without while M. entered the house through the window and stole the articles, and that they then went away together, is sufficient evidence of the identity of the articles and the guilt of the prisoner. *The People v. Boujet*, 11

2. Where two persons acted in concert in planning and executing a burglary, and one of them entered the house and brought out the property while the other waited on the outside, both were held to be guilty of a breaking and entering. *ib*

3. A person indicted for burglary in breaking and entering, &c., with intent to steal, and then and there stealing, &c., may be acquitted of the burglary and convicted on the same count for the simple larceny. *The People v. Snyder*, 23

4. On a trial for burglary, it is no valid objection to evidence tending to characterize the burglarious intent of the acts charged, that the circumstances offered to be proved, would, upon the trial of another and distinct offence, tend to con-

vict the prisoner of such latter charge; but the intent with which the prisoner entered may be determined by proof of circumstances tending to show a felony committed in an adjoining store. *Osborne v. The People*, 583

5. On the trial of an indictment for burglary, it is not sufficient to prove that the goods of the prosecutor alleged to have been burglariously taken from his barn, were carried away from the barn in the night by the defendant, and were subsequently found in his possession; but the prosecutor must also prove that the barn was broken open and the goods stolen. Such facts should be proved by the testimony of the person in the immediate possession of the barn and the goods, or a satisfactory excuse should be given why he is not called as a witness. *The People v. Caniff*, 586

C

CERTIORARI.

1. Form of a writ of *certiorari* to remove a cause from the Oyer and Terminer to the Supreme Court, after verdict and before sentence, pursuant to 2 R. S. 736, § 27, and of the certificate on which the same may be allowed under § 23. *The People v. Thurston*, 49
2. Form of an allegation of diminution—*certiorari* issued thereon,—return thereto,—joinder in error, &c.—demurrer to joinder and joinder in demurrer. *McGuire v. The People*, 148
3. Forms of a writ of *certiorari* to bring up the proceedings and judgment from a court of Special Sessions, and of return thereto, and of warrant to bring the accused before a magistrate. *The People v. Benjamin*, 201
4. Error, committed by a criminal court having jurisdiction of the offence and of the person of the prisoner can not be re-examined on *habeas corpus*; whether the error occurred at the trial or is alleged to exist in the judgment rendered, the only remedy is by *certiorari* or writ of error. *The People v. Cavanagh*, 650
5. Forms of writ of *certiorari* to remove decision on *habeas corpus*, and of return thereto, including petition for *habeas corpus*, return and traverse, and decision. *ib*

See HABEAS CORPUS.

CHALLENGE OF JURORS.

1. It is not good ground of challenge to the array, that the jury was drawn and the panel certified by the deputy clerk, instead of the clerk, who was absent. *The People v. Fuller*, 16
2. It is not a good ground of challenge to a juror for principal cause, that he had expressed his opinion hypothetically. *ib*
3. Where a juror is challenged for the favor, and triers are appointed, the juror himself may be sworn as a witness before them, to state or explain any facts which do not impeach his character or his motives. *ib*
4. Where a justice of the Supreme Court had made an order for summoning 24 additional jurors, and after the drawing of the first 36 jurors, and before the drawing of the additional 24 jurors, the old jury list had been destroyed, as required by law, and a new jury list had been substituted, and it happened that one of the 24 persons last drawn had been previously drawn as one of the 36 jurors, so that in fact only 23 additional jurors had been drawn, on challenge to the array for that cause, the challenge was overruled by the Oyer and Terminer. *The People v. Thurston*, 49

5. On the trial of an indictment at the Oyer and Terminer, for murder, after eleven jurors had been drawn and sworn, the next juror drawn was challenged for favor, and the two jurors first admitted, having been sworn as triers and having heard the evidence, the argument of counsel and the charge of the court, after consultation reported to the court that they could not agree in deciding upon the challenge; it was held, that the challenge must be retried and the court selected the third and fourth jurors to act as triers for that purpose. *The People v. Derrick.* 230
6. Suggestions as to the practice on challenges for principal cause and for favor, and as to the proper mode of selecting triers and deciding upon their competency. *ib*
7. Where a juror, on being called, is challenged on the ground of his having formed or expressed an opinion as to the guilt of the prisoner, such juror may be examined as a witness for the purpose of sustaining the challenge. *The People v. Christie,* 579
8. A juror when examined as a witness for the purpose of sustaining a challenge to the favor, will not be excused from answering whether he has any prejudice or bias against a religious sect, on the ground that such answer would disgrace him. *ib*
9. Where on the trial of several defendants on an indictment for a riot, it appeared that a secret society had been organized for the purpose of repressing the class or sect to which the defendants belonged, it was held to be competent to require a witness, who had been called and has testified on the part of the prosecution, to answer on his cross-examination, whether he was a member of such secret society. *ib*
10. Under the statutes of the state of New York, the people, in a criminal prosecution, are entitled to two peremptory challenges. *The People v. Caniff,* 586
11. Where a juror has been challenged for favor and evidence of circumstances in support of the challenge has been received and submitted to the triers without objection, it belongs to the triers and not to the court to decide whether the juror stands indifferent between the parties; and in such case the court, in charging the triers, should not instruct them how they ought to find on that point. Per *WRIGHT, J.* at the Oyer and Terminer. *The People v. McMahon,* 663

CHARACTER.

1. In cases not free from doubt, the jury are at liberty to consider the prisoner's previous good character; but such a defence is not available where the guilt of the accused is clearly established. *The People v. Hammill,* 223

COMMITMENT.

See JUDGMENT

COMMON LAW.

1. So much only of the common law of England was in force in the colony, on the 19th day of April, 1775, as was applicable to our circumstances and condition. *The People v. Randolph,* 174
2. The principles of the common law are the same under all circumstances; but its rules, or the results of the application of the principles, will vary with the facts to which it is applied, or the conditions under which the application is made. *ib*

CONFESSION.

See BURGLARY.

BLASPHEMY.

ENTRY OF JUDGMENT.

JUDGMENT.

EXCEPTIONS.

BILL OF EXCEPTIONS.

CONVICTION

See JUDGMENT.

COURT OF SESSIONS.

1. On the trial of an indictment in the court of Sessions, the county judge, presiding at the trial, can not be sworn and examined as a witness; he can not act at the same time in the capacity of both judge and witness. *The People v. Miller*, 197

E

EVIDENCE.

1. Where on a trial for burglary, the articles of property alleged to have been burglariously stolen were found in the possession of M., an alleged accomplice of the prisoner, and were brought to the prosecutor, and identified by him, proof of the confession of the prisoner that he and M. went to the house of the prosecutor together, and that the prisoner waited without while M. entered the house through the window and stole the articles, and that they then went away together, is sufficient evidence of the identity of the articles and of the guilt of the prisoner. *The People v. Boujet*, 11
2. A prisoner can not be convicted on an indictment for blasphemy, on his mere confession made out of court, that he had made use of the words charged in the indictment; the prosecutor must also show that an offence had committed, or that blasphemous words had actually been uttered. *The People v. Porter*, 14
3. On the trial of an indictment for forgery, where the witnesses disagree as to the genuineness of the signature, comparison of hands is admissible, and the prisoner may prove by the cashier of a bank or

others, who are in the habit of examining signatures with a view to detect forgeries, that the instrument alleged to be forged is not a simulated hand. *The People v. Hewett*, 20

4. On the trial of an indictment, the counsel for the prosecution has the right to introduce in evidence the examination of the prisoner taken before the committing magistrate, although it appears by such examination that no confessions were made by the prisoner, and that he refused to answer or to give any account of the transaction in question. *The People v. Banker*, 26
5. On the trial of an indictment, it is competent for the public prosecutor to prove, by parol, what the prisoner testified to on a complaint made by him before a magistrate against a third person. *The People v. Burns*, 34
6. Where it appeared that such complaint was made, and evidence given by the prisoner against others concerned in the commission of the crime, on the advice of his step-father, and on the assurance that he would be admitted as "state's evidence," it was held the evidence ought not to be excluded on the ground of admissions obtained by inducements. *ib*
7. On the trial of an indictment for murder, a witness called in behalf of the prisoner, testified on the cross-examination that the prisoner became attached to a lady while she was staying at the house of his father, and that she became pregnant at that time and during her stay there, it was held incompetent for the prosecution to prove further by the witness that the witness knew the prisoner was charged with the seduction, and that the witness heard of it within a few days after the young lady left; and where such evidence had been admitted at the Oyer and Terminer, a new trial was granted. *The People v. Thurston*, 49
8. Where on an indictment for forgery

- under 2 R. S. 761, §36, the intent charged is, to defraud the bank by which the counterfeit bills purported to have been issued, it is competent for the public prosecutor, on the trial, to prove by parol evidence, the existence of the bank and the fact of its issuing bills, without producing an authenticated copy of its charter. The rule of evidence is the same, whether the intent charged be to defraud the bank or to defraud a third person. *The People v. Chadwick*, 163
9. On a trial for an assault and battery before a court of Special Sessions, a former trial and sentence can not be given in evidence under the plea of *not guilty*. *The People v. Benjamin*, 201
10. Under the plea of *not guilty*, the defendant can only give in evidence whatever negatives the allegations in the indictment or complaint, and matters of excuse or justification. *ib*
11. A conviction before a court of Special Sessions must be proved by the record of conviction, or a duly certified copy thereof, if a record has been filed; and secondary evidence of a conviction can not be received, unless it is shown that no record of conviction has been filed. *ib*
12. Where a person charged to have been murdered by poison, expressed during his last illness, his opinion that he should not live, but was encouraged by his attending physician to believe that he would recover, his statements made immediately thereafter were held not to be admissible evidence as dying declarations. Per HARRIS, J. *The People v. Robinson*, 235
13. Very soon after the drinking of the supposed poison, the deceased was asked how he felt "after that glass of beer," held, that his answer "that he did not feel comfortable" was competent evidence, though made in the absence of the prisoner. Per HARRIS, J. *ib*
14. Where it appeared that a third person had drank with the deceased at the same time he was supposed to have been poisoned, of the same beverage and administered by the same person, and had died soon afterwards, the court permitted evidence to be given that arsenic was found in the stomach of such person, and that she died from the effects of that poison. Per HARRIS, J. *ib*
15. On a trial for burglary, it is no valid objection to evidence tending to characterize the burglarious intent of the acts charged, that the circumstances offered to be proved, would, upon the trial of another and distinct offence, tend to convict the prisoner of such latter charge; but the intent with which the prisoner entered may be determined by proof of circumstances tending to show a felony committed in an adjoining store. *Osborne v. The People*, 583
16. On a trial of an indictment for burglary, it is not sufficient to prove that the goods of the prosecutor alleged to have been burglariously taken from his barn, were carried away from the barn in the night by the defendant, and were subsequently found his possession, but the prosecutor must also prove that the barn was broken open and the goods stolen. Such facts should be proved by the testimony of the person in the immediate possession of the barn and the goods, or a satisfactory excuse should be given why he is not called as a witness. *The People v. Caniff*, 586
17. Where incompetent evidence has been received without objection, under a misapprehension, on both sides, as to the facts on which its admissibility depended, a motion to strike out such evidence may be made at any subsequent stage of the trial, when facts shall have been proved, which render it incompetent. *The People v. McMahon*,
18. On the trial of a party for the murder of his wife, where it appeared that the prisoner was ex-

amined as a witness before the coroner's inquest, and that he had been previously arrested for the murder, by a constable, without warrant, and was under arrest at the time of his examination as a witness, though the fact of his arrest was not known to the coroner, but was a separate and independent proceeding, it was held competent to prove what the prisoner testified to, before the coroner's jury. *The People v. McMahon*, 663

19. Evidence given under such circumstances will be deemed voluntary because the witness has the right to refuse to answer any question tending to criminate himself. *ib*

See CHARACTER,
FALSE PRETENCES.

F

FALSE PRETENCES.

1. In an indictment for obtaining property by false pretences, it is sufficient to allege that the property was delivered to and obtained by the defendant by means of the false pretences particularly stated and negatived, without setting forth whether the property was so obtained by a sale or bailment or otherwise; and on the trial, under such an indictment, it is competent to prove in what manner the property was obtained, whether by sale, or bailment or in any other way. *Skiff v. The People*, 139
2. Where, in such a case, the indictment charged the pretence of owning two pieces of land, in the town of Easton in the county of Washington, designating them as the "home farm," or place, and the "Van Schaack farm," the description was held to be sufficiently definite. *ib*
3. Where the property was obtained on credit, and the person parting with the property was to receive a note payable at a bank, on which he could get the money, it was held to be competent for the public prosecutor to prove that the note was not paid, though the fact that the note was not paid, was not alleged in the indictment. *ib*
4. It is not necessary to negative all the pretences in an indictment for such an offence, nor to prove all that are negatived to be false. *ib*
5. Whether the prosecutor used ordinary prudence and diligence, in inquiring into the truth of the pretences, and whether the pretences were sufficient to deceive, are questions of fact for the jury. *ib*
6. Where it appeared that the false pretences were made, and the property obtained by them was delivered in the county of Washington, that was held to be the proper county for the trial of the offence, though it appeared that by agreement of the parties the note given for the property was not made and delivered till a subsequent time and in a different county. *ib*
7. On the trial of an indictment for obtaining an endorsement of a note by false pretences, it is proper for the prosecutor to state, as a witness, what influence the representations of the defendant had upon him, by way of inducing him to endorse the note. *The People v. Miller*, 197
8. Where, on such trial, it had been charged in the indictment and was proved on the trial, that the defendant obtained the endorsement by representing, among other things, that all his last year's debts had been settled and paid, it was held that such representations could not be shown to be false, by proving a specific indebtedness existing at the time, unless the existence of such specific indebtedness had been alleged in the indictment. *ib*
9. Where the property was obtained on credit, and the person parting with the property was to receive a note payable at a bank, on which he could get the money, it was held to be competent for the public prosecutor to prove that the note was not paid, though the fact that the note was not paid, was not alleged in the indictment. *ib*

FELONY.

See NEW TRIAL.

FORGERY.

1. On the trial of an indictment for forgery, where the witnesses disagree as to the genuineness of the signature, comparison of hands is admissible, and the prisoner may prove by the cashier of a bank or others, who are in the habit of examining signatures with a view to detect forgeries, that the instrument alleged to be forged is not a simulated hand. *The People v. Hewit*, 20
2. Forging a receipt for a note of hand, which when paid will be in full, &c., does not come within the provisions of "the act to prevent forging and counterfeiting," passed April 2, 1813, but it is a misdemeanor at common law. *The People v. Hoag*, 36
3. Where, in an indictment for forgery, under 2 R. S. 761, § 36, the intent charged is, to defraud the bank by which the counterfeit bills purported to have been issued, it is competent for the public prosecutor, on the trial, to prove by parol evidence, the existence of the bank and the fact of its issuing bills without producing an authenticated copy of its charter. The rule of evidence is the same, whether the intent charged be to defraud the bank or to defraud a third person. *The People v. Chadwick*, 163

FORMER TRIAL.

See NEW TRIAL.

H

HABEAS CORPUS.

1. Error committed by a criminal court having jurisdiction of the offence, and of the person of the prisoner can not be reexamined on *habeas corpus*; whether the error occurred at the trial or is alleged to exist in the judgment rendered, the only remedy is by *certiorari* or *writ error*. *The People v. Cavanagh*, 650
2. Though, in such cases, matters anterior to the judgment can not be reexamined on *habeas corpus*, yet the officer may discharge for reasons arising subsequent to the judgment, such as the expiration of the term of imprisonment, the payment of the fine imposed, a reversal of the judgment or an executive pardon. *ib*
3. Where the imprisonment is under process valid on its face, it will be deemed *prima facie* legal, and the prisoner must assume the burthen of proving its invalidity by showing a want of jurisdiction. *ib*
4. Error, irregularity, or want of form is no ground for discharging on *habeas corpus*, nor is any defect which may be amended or remedied by further entry, or by motion. *ib*
5. Where, on *habeas corpus*, it becomes material to know of what particular misdemeanor the prisoner was convicted, in order to determine whether the commitment was legal, resort may be had to the record, if one has been made up and filed, and if not, to the indictment upon which he was tried and convicted, and to which the entry in the minutes refers. *ib*
6. It forms no ground for a discharge on *habeas corpus*, that the court of Oyer and Terminer erred in sentencing a prisoner convicted of a misdemeanor, to imprisonment in the county jail, instead of the penitentiary. *ib*
7. Forms of writ of *certiorari* to remove decision on *habeas corpus*, and of return thereto, including petition for *habeas corpus*, return and traverse and decision. *ib*

HUSBAND AND WIFE.

1. A husband has no right to beat his wife, or to inflict corporal punishment upon her, but he may defend himself against her, and may restrain her from acts of violence towards himself or towards others. *The People v. Winters*, 10

See BIGAMY.

I

INDICTMENT.

1. In alleging the commission of perjury, the day laid in the indictment is not material, and the offence may be proved to have been committed on any other day before or after the time laid. *The People v. Hoag*, 9
2. In setting out the proceedings of a court of inferior or limited jurisdiction, the indictment should always state enough to show that such court had jurisdiction of the case. *The People v. Cook*, 12
3. It is not sufficient in an indictment, to describe the property stolen as "sixty dollars in bank bills current money, of the value of sixty dollars" or "bank bills, being current money of the state of New York of the value of sixty dollars." The number of bills stolen should be stated. *Low v. The People*, 37
4. After pleading not guilty to an indictment for murder, and before the empanelling of a jury, an objection was made in behalf of the prisoner, that the caption of the indictment erroneously described Israel S. Hoyt, one of the justices who held the court at which the indictment was found as "one of the justices of the peace in and for the county of Tioga," and that by the constitution and laws of this state, a justice of the peace was a town and not a county officer, but the objection was overruled by the Oyer and Terminer. *The People v. Thurston*, 9
5. In an indictment for obtaining property by false pretences, it is sufficient to allege that the property was delivered to and obtained by the defendant by means of the false pretences particularly stated and negatived, without setting forth whether the property was so obtained by a sale or bailment or otherwise, and on the trial under such an indictment, it is competent to prove in what manner the property was obtained, whether by sale

or bailment or in any other way. *Skiff v. People*, 139

6. Where in such a case, the indictment charged the pretence of owning two pieces of land in the town of Easton in the county of Washington, designating them as the "home farm," or place and the "Van Schaack farm," the description was held to be sufficiently definite. 1b
7. It is not necessary to negative all the pretences in an indictment for such an offence; nor to prove all that are negatived to be false. 1b
8. Forms of an indictment for kidnapping, with intent to sell, under section 28 of 2 R. S. 664, and of an indictment for inveigling a person of color and selling him as a slave under section 32, and of demurrer and joinder in demurrer. *The People v. Merrill*, 590

INSANITY.

1. Every person is presumed to be sane till the contrary appears. *The People v. Kirby*, 28
2. It is a defence to an indictment for crime, that the act complained of was done under an insane impulse, which, at the time, destroyed the capacity to distinguish between right and wrong. *The People v. Sprague*, 43
3. On the trial of an indictment for robbing a female of her shoe, in day light, in the public street of a city, it being proved that the accused had been, for several years, and ever since an injury to his head, which it was supposed had affected his brain, in the habit of taking the shoes of females, wherever he could find them, and secreting them without any apparent object for so doing, and that insanity was a hereditary disease in the family of the prisoner on the side of his mother, with other circumstances tending to establish monomania, after hearing the testimony of eminent medical men on the subject,

the prisoner was acquitted on the ground of insanity. *ib*

4. On a trial involving an inquiry as to the sanity of a prisoner, a medical witness can not be permitted to give his opinion on the case, or on the question of guilt, but only on the question of sanity. Per SHANKLAND, J. *The People v. Thurston*, 49

5. Nor can a medical witness be permitted to give his opinion on the prisoner's sanity, where he has heard only part of the evidence on the subject, and his opinion has been formed on such part of the evidence. Per SHANKLAND, J. *ib*

6. A medical witness may give his opinion on a hypothetical statement of facts, and it will be for the jury to judge whether the supposed facts so stated correspond with the facts as proved. Per SHANKLAND, J. *ib*

7. Opinions of eminent medical witnesses upon the subject of insanity, with their statements of the symptoms and evidence of insanity, and of the causes which produce it. *ib*

8. Rules and directions to govern a jury on trial of the question of present insanity, on an indictment for murder. *The People v. Lake*, 215

9. Symptoms of poisoning by arsenic described by physicians, with their opinions on the subject of insanity set forth in the evidence. *The People v. Robinson*, 235

See INTOXICATION.

INTOXICATING LIQUORS.

1. It is not a misdemeanor under the statute, for an innkeeper to sell spirituous liquors to be drank on the premises on Sunday, to persons not lodgers or travelers. *Van Zant v. The People*, 168

2. The act entitled "an act for the

prevention of intemperance, pauperism and crime," passed April 9, 1855, so far as it prohibits, the sale of intoxicating liquors to be drank as a beverage, is in conflict with that portion of art. 1, sec. 6, of the state constitution, which declares that no person shall be deprived of property without due process of law, and is therefore void. Justice ROCKWELL dissenting. *The People v. Toynbee*, 229

3. So much of the first section of the act, as declares that intoxicating liquor shall not be sold or kept for sale, or with intent to be sold, except by the persons and for the special uses mentioned in the act:—
So much of sections 6, 7, 10 and 12, as provides for its seizure, forfeiture and destruction:—

So much of 16th section as declares that no person shall maintain an action to recover the value of any liquor sold or kept by him, which shall be purchased, taken, detained or injured, unless he can prove that the same was sold according to the provisions of the act, or was lawfully kept and owned by him:—

So much of section 17, as declares that upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale:—

And so much of section 25, as declares that intoxicating liquor kept in violation of any of the provisions of this act shall be deemed a public nuisance, are repugnant to the provisions of the constitution for the protection of liberty and property and absolutely void. Per BROWN, J. *ib*

4. The last clause of the first section of the act, entitled "an act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, does not exempt imported liquors from the operation of that act, after they have passed from the ownership of the importer. *Wynterhamer v. The People*, 377

5. The provisions of the first section of the act prohibiting the sale of intoxicating liquors, are not in contravention of that clause of the

constitution of this state, which declares, that "no person shall be deprived of life, liberty and property without due process of law." *ib*

6. By the 5th section of the act "to prevent intemperance, pauperism and crime," passed April 9, 1855, the several officers therein mentioned are invested with the same powers, in relation to offences under that act, with which justices of the peace are clothed in criminal cases, and are each required to hold courts of Special Sessions for the trial of offences under that act, with the same powers in reference to such offences as courts of Special Sessions possessed, in regard to cases within their jurisdiction, as they were constituted when the act was passed. *The People v. Fisher,* 402

7. Where a person charged with a violation of that act is brought before one of the magistrates mentioned in such fifth section, it is the duty of such magistrate to hold a court of Special Sessions, and to try the person charged, as soon as the complainant can be notified, and the person charged has not the right to give bail to appear before the next criminal court at which there shall be a grand jury. *ib*

8. The legislature of this state has the power to enact a law prohibiting the sale of intoxicating liquors, and to provide penalties for its violation. *The People v. Quant,* 410

9. The act of April 9, 1855, so far as it prohibits the sale of intoxicating liquors, imposes penalties for its violation and provides for their enforcement, is not in conflict with the constitution of the United States or of this state. *ib*

10. Foreign liquor, after it has passed beyond the hands of the importer, or after the original package has been broken for use or sale, is not exempted from the operation of the statute by the last clause of the first section of the act. *ib*

11. Those sections of the old excise

law, which prohibited the sale of all liquors in quantities less than five gallons without license, are not repealed by the act of 1855, but still remain in force. *ib*

12. Intoxicating liquors, to be used as a beverage, are property in the most absolute and unqualified sense of the term; and as such as much entitled to the protection of the constitution as lands, houses, or chattels of any description. *Wynehamer v. The People,* 421

13. All property is alike in the characteristic of inviolability, without reference to the question of its utility. *ib*

14. The prohibitions and penalties of the act "to prevent intemperance, pauperism and crime," pass the utmost boundaries of mere regulation and police, and by their own force, assuming them to be valid and faithfully obeyed and executed, work the essential loss or destruction of the property at which they are aimed. The act is therefore in violation of that clause of the constitution which declares that no person shall be deprived of his property "without due process of law," and is unconstitutional and void. *ib*

15. The terms "law of the land" and "due process of law," as used in the state constitution, are restraints upon legislation, and in all cases require a judicial investigation, not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question, whether, under the pre-existing rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed. *ib*

16. The word "property" includes the power of disposition and sale, as well as the right of private use and enjoyment; and where a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is *deprived* of it, within the meaning of the constitutional provision. *ib*

17. The prohibitory act, in its operation upon property in intoxicating liquors, existing in the hands of any citizen of this state when the act took effect, is a violation of the provision in the constitution of this state, which decrees that no person shall be "deprived of life, liberty or property without due process of law," inasmuch as the various provisions, prohibitions and penalties of the act substantially destroy the property in such liquors *ib*
18. Inasmuch as the act does not discriminate between such liquors existing when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant any defence based upon the distinction referred to, it can not be sustained as to any such liquor, whether existing at the time the act took effect or acquired subsequently. *ib*
- . *It seems*, it would be competent for the legislature to pass such an act as the one under consideration, (except as to some of the forms of proceeding to enforce it,) provided such act should be plainly and distinctly prospective as to the property on which it should operate. *ib*
20. The act of April 9, 1855, entitled "an act for the prevention of intemperance, pauperism and crime," in its operation upon property in intoxicating liquors existing in the hands of any inhabitant of this state when the act took effect, is a violation of that provision in the constitution of this state, which declares that no person "shall be deprived of life, liberty or property without due process of law," for the reason that by the provisions, prohibitions and penalties contained in the act, it substantially destroys the property in such liquors. *The People v. Toynbee*, 487
21. Inasmuch as the prohibitory act does not discriminate between liquors existing when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and does not countenance or warrant any defence based on such distinction, it can not be sustained in respect to any such liquor, whether existing at the time the act took effect or acquired subsequently. *ib*
22. It would be competent for the legislature to pass such an act as the prohibitory act, (except as to some of the forms of proceeding to enforce it,) provided such act should be plainly and distinctly prospective, as to the property in which it should operate. *ib*
23. The expression in the constitution "due process of law," was intended to secure to every citizen, at least in criminal cases, the benefit of those rules of the common law, by which judicial trials are regulated, and to place them beyond the reach of legislative subversion. By SELDEN, J. *ib*
24. The first branch of the seventeenth section of the prohibitory act which provides that "upon the trial of any complaint commenced under any provisions of this act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of sale," is in violation of the constitutional provision which secures to every person a trial by due process of law, inasmuch as it authorizes a presumption of guilt, when the common law would presume innocence. Per SELDEN, J. *ib*
25. The legislature has no power to subvert that fundamental rule of justice, which holds that every man shall be presumed innocent until he is found guilty. Per SELDEN, J. *ib*
26. The second branch of the seventeenth section of the act, which provides, that upon the trial of a complaint for an unlawful sale of liquor, the defendant shall not be permitted to justify under the second section, unless he shall admit the sale, swear that at the time he sold the liquor he believed it was not intended to be used in a mode forbidden by the act, and set forth

the reasons on which his belief was founded, is a violation of that provision of the constitution of this state which secures to the party accused the right "to appear and defend," and of that which declares that no person "shall be compelled to be a witness against himself," and is therefore void. Per SELDEN, J. *ib*

" The last clause of the first section of the prohibitory act does not except imported liquors from the operation of the act, after they have left the hands of the importer. Per HUBBARD and T. A. JOHNSON, JJ. *ib*

28. The prohibitory act, in prohibiting the sale of imported liquors, by retail, within the interior of the state, after they have left the hands of the importer, is not legally objectionable, as being in conflict with the revenue laws of the United States. Per HUBBARD, J. *ib*

29. That portion of the prohibitory act which authorizes the seizure and destruction of liquor where the prosecution or conviction of the owner is not contemplated, is unconstitutional and void, inasmuch as it deprives the citizen of his property, without "due process of law." Per HUBBARD, J. *ib*

INTOXICATION.

1. Intoxication is no excuse on an indictment for blasphemy. *The People v. Porter*, 14

2. Intoxication is a voluntary deprivation of reason, and can not be given in evidence, even on a trial for murder, to excuse the offender. *The People v. Fuller*, 16

3. That a prisoner was intoxicated is no defence to an indictment for perjury. *The People v. Willey*, 19

4. It is a rule of the common law, that a person is held to intend that which in the ordinary course of things would be the natural result of his own acts. Illustrations of this rule given by the presiding

judge, in his charge to the jury, with explanations as to its applicability in a case of intoxication. *The People v. Hammill*, 223

5. Voluntary drunkenness is not a legal excuse for the commission of crime. The rule is otherwise where the drunkenness is not voluntary. *The People v. Robinson*, 235

6. In the case of *delirium tremens* or *mania a potu*, the insanity excuses the act, the frenzy being not the immediate, but a remote consequence of indulgence in strong drink. *ib*

7. But where the nature and essence of the crime are made by law to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness may be a proper subject for the consideration of the jury, not to excuse or mitigate the offence, but to show that it was not committed. Per PARKER, J. *ib*

8. A person stimulated even to the highest pitch of frenzy by voluntary indulgence in strong drink, may still be capable of planning and executing a criminal design; and where in such case there is mind enough to conceive and perpetrate the act, there is enough to subject the offender to legal responsibility. *ib*

9. Where, on trial of an indictment for murder by poisoning, the judge charged the jury "that if the prisoner was intoxicated to such an extent that she was unconscious of what she was doing, still the law holds her responsible for the act," but it appeared from other parts of the charge, that the judge intended to speak and that the jury must have understood him as speaking only with reference to a state of mental excitement or madness, the immediate consequence of indulgence in strong drink, and not of a state of insensibility, *held*, that the charge was not erroneous. *ib*

10. *Held*, also, that even though the expression excepted to could not be regarded as modified and explained

by other parts of the charge, and might be considered erroneous as an abstract and separate proposition, yet that it furnished no ground for granting a new trial, it appearing plainly that it had no applicability to the case, there being no fact or circumstance to warrant an inference, that the accused was at the time of the commission of the act, in a state of unconsciousness or insensibility from intoxication. *ib*

See INTOXICATING LIQUORS.

J

JUDGMENT

1. Upon a conviction at the Oyer and Terminer it is sufficient to state in the entry of judgment in the minutes, under the requirement of 2 R. S. 728, § 5, that the defendant was convicted of a misdemeanor; and a more particular description of the offence need not be stated, nor is a more particular description of the offence necessary in the warrant of commitment; *The People v. Cavanagh*, 650

JURISDICTION.

1. In setting out the proceedings of a court of inferior or limited jurisdiction, the indictment should always state enough to show that such court has jurisdiction of the case. *The People v. Cook*, 12
2. Verbal agreements as to proceedings upon an indictment made by parties and their counsel, in the presence of a court of Oyer and Terminer, will be enforced, if the court has jurisdiction of the case to which they refer. But jurisdiction of an indictment pending in another court can not be conferred by such an agreement. *The People v. Hartwell*, 32
3. But where, under such an agreement, the prisoner gave bail to appear at the next court of Oyer and Terminer, the court refused to discharge him from such recognizance, on the ground of the general jurisdiction of the court over all crimes and offences, and required the prisoner to give bail to appear in the court in which the indictment was pending. *ib*
4. A state has no jurisdiction of crimes committed beyond its territorial limits. *The People v. Merrill*, 590
5. Every statute is presumed to be enacted with reference to the local jurisdiction of the legislature of each state. *ib*
6. Section 32 of 2 R. S. 665, which provides for the punishment, as for a felony, of every person who shall sell, or in any manner transfer, for any term, the services or labor of any black, mulatto or other person of color, who shall have been forcibly taken, inveigled or kidnapped from this state to any other state, place or country, is not applicable to a sale or transfer made in another state of a black inveigled in this state. *ib*
7. To give it a broader construction and make it applicable to a sale or transfer made in another state, would make it repugnant to the constitution of the United States, (amendment, art. 6,) which declares that, in criminal proceedings, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed; and also to article 4, section 2 of the constitution of the United States, which declares that the citizens of each state shall be entitled to all the immunities of the citizens of the several states; and provides that a person charged in any state with treason, or felony, or other crime, who shall flee from justice, or shall be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. *ib*

JURY, GRAND AND PETIT.

1. Form of an order for summoning additional jurors under 2 R. S. 417, § 41. *The People v. Thurston*, 49
2. To give validity to proceedings in the Oyer and Terminer, it is necessary that process for summoning the petit jury should be issued, and that it should also be returned and filed in the office of the clerk of the county. *McGuire v. The People*, 148
3. Where, after a trial and conviction for murder at the Oyer and Terminer, it appeared, on writ of error, that no precept for summoning the petit jury had been returned and filed, the conviction was held to be erroneous and the judgment was reversed. *ib*
4. *It seems*, also, that the issuing of the precept is necessary to give validity to the acts of the grand jury, and that, after verdict, the prisoner may, on error, avail himself of the objection that no precept had been issued for summoning the grand jury. *Per PRATT, J.* *ib*
5. After verdict, it is too late to object for the first time that no precept was issued by the district attorney to the sheriff, requiring him, among other things, to summon a grand jury, under 2 R. S. 206, § 37, it appearing that the grand jury was regularly drawn and summoned according to the requirements of the statute. *The People v. Robinson*, 235
6. A grand jury has full power to make inquiry and to present by indictment all persons charged with crime, whether such persons are or are not under arrest and examination before any of the magistrates of the county. *The People v. Hyler*, 566
7. It is no good reason for quashing an indictment, that at the time it was found, the defendants were under arrest on a warrant issued by the coroner, after an inquisition found by a coroner's jury implicating the defendants in the crime, and that the preliminary examina-

tion before the coroner had not been brought to a close. *ib*

8. Where a coroner's jury find that a murder has been committed, and the coroner binds over the witnesses to appear at the next criminal court at which an indictment can be found, it is the duty of the grand jury to proceed at once to act upon the case without reference to the facts, whether the accused is in custody or whether he is then under examination before the coroner. *ib*
9. A grand jury ought not to find an indictment, unless the testimony against the accused, *ex parte* and unexplained, is sufficient to convict. *The People v. Hyler*, 570

See BILLS OF EXCEPTIONS.
TRIAL BY JURY.
NEW TRIAL.

JUSTICE OF THE SESSIONS.

See INDICTMENT.

K

KIDNAPPING.

1. Section 32 of 2 R. S. 665, which provides for the punishment, as for a felony, of every person who shall sell, or in any manner transfer, for any term, the services or labor of any black, mulatto or other person of color, who shall have been forcibly taken, inveigled or kidnapped from this state to any other state, place or country, is not applicable to a sale or transfer made in another state of a black inveigled in this state. *The People v. Merrill*, 590
2. To give to it a broader construction, and make it applicable to a sale or transfer made in another state, would make it repugnant to the constitution of the United States, (amendment, art. 6,) which declares that in criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, and also to article 4, section 2 of the constitution of the United States, which declares that the citizens of each state shall be entitled to all the immunities of the citizens of the several states; and provides that a person charged in any state with treason, or felony, or other crime, who shall flee from justice, or shall be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime. *ib*

3. Forms of an indictment for kidnapping, with intent to sell, under section 28 of 2 R. S. 664, and of an indictment for inveigling a person of color and selling him as a slave under section 32, and of demurrer and joinder in demurrer. *ib*

See JURISDICTION.

L

LARCENY.

1. Stealing a promissory note was not felony at common law, and an indictment for such stealing should conclude *contra formam statuti*. *The People v. Cook*, 12
2. On an indictment for a second offence of petit larceny, charged to have been committed after a conviction for the first offence before a court of Special Sessions, the indictment must show that the court of Special Sessions had jurisdiction to try the first offence. *ib*
3. In setting out the proceedings of a court of inferior or limited jurisdiction, the indictment should always state enough to show that such court had jurisdiction of the case. *ib*
4. If a servant entrusted with the care of a horse of his master, take it from the stable of his master with intent to run away with it, he is guilty of

stealing. The horse in the stable of the master is in the actual possession of the master and not of the servant. *The People v. Wood*, 22

5. The statute makes "bank notes" and not "bank bills" the subject of larceny. But where the property stolen was called in the indictment "bank bills," it was held sufficient, bank notes being commonly called and known as bank bills. *Low v. The People*, 37
6. It is not sufficient, in an indictment, to describe the property stolen as "sixty dollars in bank bills, current money, of the value of sixty dollars," or "bank bills, being current money of the state of New York, of the value of sixty dollars." The number of bills stolen should be stated. *ib*
5. On the trial of an indictment for larceny, alleged to have been committed in stealing bank notes, the jury must be satisfied from the evidence of their genuineness; and where the court refused to charge that the prisoner ought to be acquitted, unless the evidence showed their genuineness, it was held to be erroneous, and the prisoner having been convicted, the conviction was reversed and a new trial ordered. *ib*

LEGISLATIVE POWER.

1. The "legislative power" conferred by the constitution on the legislature, is not subject to any judicial control beyond the restrictions specially declared in the constitution, if it be not so exercised as to invade the constitutional province of some other department of the government. Per *SELDEN* and *A. S. JOHNSON*, JJ. *The People v. Toynebee*, 487

M

MANSLAUGHTER.

1. Where a person carelessly discharged a gun loaded with ball into

the highway, when it was quite dark, and thereby unintentionally killed a person who was passing, and whom he did not see, such killing was manslaughter at common law. *The People v. Fuller*, 16

MISDEMEANOR.

1. Forging a receipt for a note of hand, "which when paid will be in full," &c., does not come within the provisions of "the act to prevent forging and counterfeiting," passed April 2, 1813, but it is a misdemeanor at common law. *The People v. Hoag*, 36
2. It is not a misdemeanor, under the statute, for an innkeeper to sell spirituous liquors to be drank on the premises, on Sunday, to persons not lodgers or travelers. *Van Zant v. The People*, 168
3. A person arrested under a warrant, for a misdemeanor, in violating the act entitled "an act for the prevention of intemperance, pauperism and crime," passed April 9, 1855, when brought before the magistrate, has a right to give bail for his appearance at the next court of Sessions, or the next criminal court to be held in the county. *The People v. Kennedy*, 312
4. That right conferred in such cases by the provisions of the Revised Statutes, is not taken away either by express terms or by implication, by the 5th section of said act. *ib*
5. A provision denying to a person so arrested the right to give bail, and compelling him to be tried for said offence by the magistrate as a court of Special Sessions, would be unconstitutional and void under art. 1, sec. 2 of the state constitution. *ib*
6. The law in reference to an examination applicable to other cases of misdemeanor, is alike applicable to offences for selling intoxicating liquor contrary to the provisions of the act "to prevent intemperance, pauperism and crime," passed April

9, 1855. *The People v. Johnson*, 322

7. A person charged with the offence of selling intoxicating liquor contrary to the provisions of that act, has the right to give bail to appear and answer at the next criminal court having cognizance of the offence, and in which he may be indicted, as in other misdemeanors triable by a court of Special Sessions. *ib*

MURDER.

1. That an indictment was recently found, is not a ground for putting off a trial in a capital case, especially where the prisoner has been a long time in prison, charged with the offence. *The People v. Fuller*, 16
2. Every willful and intentional taking of life of a human being without a justifiable cause, is murder at common law, if done with deliberation and not in the heat of passion, and legal malice is always implied in such cases. *The People v. Kirby*, 28
3. It is not necessary to prove express malice or ill will against the person killed; thus when children were drowned to prevent their coming to want, it was held that the law would imply malice from the illegality of the act. *ib*
4. On the trial of an indictment for murder, a witness called in behalf of the prisoner, testified on the cross-examination, that the prisoner became attached to a lady while she was staying at the house of his father, and that she became pregnant at that time and during her stay there, and it was held incompetent for the prosecution to prove further by the witness, that the witness knew the prisoner was charged with the seduction, and that the witness heard of it within a few days after the young lady left; and where such evidence had been admitted at the Oyer and Terminer, a new trial was granted. *The People v. Thurston*, 49

5. On the trial of the prisoner for the murder of his wife, it having been proved that he killed her by stamping upon her, the court charged the jury that the crime was murder, if the prisoner intended to take the life of his wife; but that if he intended only to wound and bruise her, it was manslaughter in the second degree. *The People v. Ham-mill*, 223
6. The court further charged, that, if the prisoner designed to take the life of the deceased, it made no difference as to the offence, whether he was drunk or sober at the time. *ib*
7. That though intoxication does not excuse crime, yet that the jury might take into consideration the fact of intoxication, so far as it would aid them in determining with what intent the act was done. *ib*
8. A case can not be brought within the first subdivision of the statute defining murder, (2 R. S. 657, § 5,) unless there be a premeditated design, *in fact*, to effect the death of the person killed, or of some other human being. Per PARKER, J. *The People v. Robinson*, 235
9. Form of an indictment for murder by poisoning, with counts at common law and under the statute. *ib*
10. Where on the trial of an indictment for murder by poisoning, the judge charged the jury "that if the prisoner was intoxicated to such an extent that she was unconscious of what she was doing, still the law holds her responsible for the act," but it appeared from other parts of the charge, that the judge intended to speak, and that the jury must have understood him as speaking, only with reference to a state of mental excitement or madness, the immediate consequence of indulgence in strong drink, and not of a state of insensibility, *held*, that the charge was not erroneous. *ib*
11. *Held*, also, that even though the expression excepted to could not be regarded as modified and explained by other parts of the charge, and might be considered erroneous as an abstract and separate proposition, yet that it furnished no ground for granting a new trial, it appearing plainly that it had no applicability to the case, there being no fact or circumstance to warrant an inference that the accused was, at the time of the commission of the act, in a state of unconsciousness or insensibility from intoxication. *ib*
12. Where a person, charged to have been murdered by poison, expressed during his last illness, his opinion that he should not live, but was encouraged by his attending physician to believe that he would recover, his statements made immediately thereafter were held not to be admissible evidence as dying declarations. Per HARRIS, J. *ib*
13. Very soon after the drinking of the supposed poison, the deceased was asked how he felt "after that glass of beer," *held*, that his answer, "that he did not feel comfortable," was competent evidence, though made in the absence of the prisoner. Per HARRIS, J. *ib*
14. Where it appeared that a third person had drank with the deceased at the same time he was supposed to have been poisoned, of the same beverage and administered by the same person, and had died soon afterwards, the court permitted evidence to be given that arsenic was found in the stomach of such person, and that she died from the effects of that poison. Per HARRIS, J. *ib*
15. Symptoms of poisoning by arsenic described by physicians, with their opinions on the subject of insanity, set forth in the evidence. *ib*
16. On a motion to admit to bail, on an indictment for murder, upon the testimony taken before the coroner, and before the grand jury, the defendants will not be permitted to furnish further proof, either by affidavits or oral testimony tending to establish their innocence. *The People v. Hyler*, 570

17. The second subdivision of section 5, title 1, chap. 1, part 4 of the Revised Statutes (2 R. S. 657,) which declares the killing of a human being to be murder, &c., "when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any individual" does not embrace the case of killing by an unprovoked and cruel beating where there was no intention to take life. *Darry v. The People*, 606
18. The language of that subdivision is not applicable to the case of homicide resulting from a direct assault by one person upon another. *ib*
19. The dicta in *The People v. Enoch*, (13 Wend. R. 159,) *The People v. Rector*, (19 Wend. R. 596) and *The People v. White*, (24 Wend. R. 520,) by which a contrary opinion was expressed, disapproved. *ib*
20. On the trial of a party for the murder of his wife, where it appeared that the prisoner was examined as a witness before the coroner's inquest, and that he had been previously arrested for the murder, by a constable, without warrant, and was under arrest at the time of his examination as a witness, though the fact of his arrest was not known to the coroner, but was a separate proceeding, it was held competent to prove what the prisoner testified to before the coroner's jury. *The People v. McMahon*,
2. Where, on a trial for a felony, after the public prosecutor has entered upon his case and given evidence to the jury, he finds himself unprepared with the proper evidence to convict, and obtains leave of the court to withdraw a juror, and thus arrest the trial, such withdrawal not being the result of improper practice on the part of the defendant or any one acting with or for him, or of any overruling inevitable necessity, the defendant can not be again put on trial for the same offence. *Klock v. The People*, 676
3. The objection to a second trial in such a case, does not rest upon the constitutional provision that no person shall be subject to be twice put in jeopardy for the same offence; that provision is a protection only where there has been a conviction or acquittal by the verdict of a jury, and judgment has passed thereon, and does not apply to a case where the jury have been discharged without giving any verdict where judgment has been arrested. *ib*
4. But the objection lies back of the constitution and rests upon the principles of the common law, which are essential to the protection of the accused, by securing him a speedy and impartial trial and the best means of vindicating his innocence. *ib*
5. Whether the same rule applies to trials for mere misdemeanors, *quere?* *ib*
6. The decision in the case of the *People v. Ellis*, (15 Wend. R. 371,) doubted. *ib*
7. The practice to be adopted in bringing up the question in such a case, discussed. *ib*

N

NEW TRIAL.

1. A new trial will not be granted on the ground of newly discovered evidence, where such evidence might have been procured by ordinary diligence; nor will a new trial be granted on the ground of surprise, where the party becomes surprised after the rendering of the verdict. *The People v. Mack*, 673

O

OYER AND TERMINER.

1. It is not error for a justice of the Supreme Court to preside at the

Oyer and Terminer, during the year in which he is a judge of the Court of Appeals. *McCarron v. The People*, 183

2. Although he is a judge of the Court of Appeals, he is also a justice of the Supreme Court, and may exercise all the powers and discharge all the duties of a justice of the Supreme Court. *ib*

3. A court of Oyer and Terminer is a court of superior criminal jurisdiction, having power to try all crimes and misdemeanors, and though its record does not show the service of process on the defendant, its jurisdiction over the person will be presumed. *The People v. Cavanagh*, 650

4. Upon a conviction at the Oyer and Terminer, it is sufficient to state in the entry of judgment on the minutes, under the requirement of 2 R. S. 728, § 5, that the defendant was convicted of a misdemeanor; and a more particular description of the offence need not be stated. Nor is a more particular description of the offence necessary in the warrant of commitment. *ib*

P

PERJURY.

1. In alleging the commission of perjury, the day laid in the indictment is not material, and the offence may be proved to have been committed on any other day, before or after the time laid. *The People v. Hoag*, 9

2. That the prisoner was intoxicated is no defence to an indictment for perjury. *The People v. Willey*, 19

PLEA.

1. Where, after pleading *not guilty*, any thing occurs available as a defence, the defendant can only avail of it by a subsequent plea. *The People v. Benjamin*, 201

POISONING.

See INSANITY.

R

RAPE.

1. Although by the common law of England, a person under 14 years of age is conclusively presumed to be incapable of committing the crime of rape, in this state the presumption is not conclusive, and may be overcome by showing that the party charged had attained to puberty. *The People v. Randolph*, 174

2. The presumption of the incapacity of a person under 14 years of age to commit a rape, can only be overcome by clear proof of capacity; and where, on the trial at the Oyer and Terminer, the presiding judge submitted to the jury the question of capacity, on evidence strongly suggestive of doubt, if not entirely reconcilable with innocence, and the jury found the prisoner guilty, the conviction was reversed and a new trial awarded. *ib*

3. A boy under 14 years of age, indicted for rape, being presumed to be physically incompetent to commit the crime, can not be convicted of an assault and battery with intent to commit a rape, though he may be convicted of simple assault and battery. *The People v. Randolph*, 213

S

SPECIAL SESSIONS.

1. History of the court of Special Sessions since its first organization, with comments upon its powers and jurisdiction. *The People v. Kennedy*, 312

See SPIRITUOUS LIQUORS.
TRIAL BY JURY.

T

TRIAL.

1. That an indictment was recently found is not a ground for putting off a trial in a capital case, especially when the prisoner has been a long time in prison, charged with the offence. *The People v. Fuller*, 16

See INSANITY.

MURDER.

COURT OF SESSIONS.

NEW TRIAL.

TRIAL BY JURY.

1. The words "trial by jury," as used in the state constitution, mean a jury of twelve men, as at common law. *The People v. Kennedy*, 312
2. The words "heretofore used," in the same section, mean "in use at the time of the adoption of the constitution" *ib*
3. At the time of the adoption of the constitution, a person charged with the commission of a misdemeanor, had the right to a trial by a jury of twelve men. He could secure this right when brought before the committing magistrate, by giving bail to appear at the next criminal court. *ib*

4. The constitutional provision under which a person charged with a misdemeanor is entitled to a trial by jury, is applicable to any offence of the same grade created by statute after the adoption of the constitution. *ib*

5. The right to a trial by a common law jury of twelve men, in cases of misdemeanor, is secured by the constitution of this state, and can not be taken away by the legislature. *The People v. Johnson*, 322

6. The provision of the 5th section of the act, which requires a person accused to be tried before a court of Special Sessions, and deprives

him of the privilege of giving bail to appear before the next criminal court, is unconstitutional and void, inasmuch as it takes away the right of "trial by jury," secured by the constitution of this state. *The People v. Toynbee*, 229

7. This provision of the act is not in contravention of the state constitution, which declares that "the trial by jury" in all cases in which it has been heretofore used, shall remain inviolate forever. *The People v. Fisher*, 402

8. The words "trial by jury" in the state constitution mean a trial by a common law jury of twelve men. *ib*

9. The expression in the state constitution, "the trial by jury," refers as well to other incidents of the trial, as to the number of men necessary to constitute a jury, and implies an indictment by a grand jury and in a court of record with common law jurisdiction. *ib*

10. The proceeding in a court of Special Sessions authorized by the said act is unconstitutional and void, on the ground that the party accused is thereby deprived of the right of trial by jury guaranteed by the constitution. *The People v. Toynbee*, 487

See NEW TRIAL.

W

WITNESS.

1. Where several persons are jointly indicted, one of them is not a competent witness for or against the others, without being first acquitted or convicted; and it makes no difference whether the defendants plead jointly or separately. An accomplice separately indicted is competent. *The People v. Donnelly*, 182
2. On the trial of an indictment in the court of Sessions, the county judge presiding at the trial, can not be

- sworn and examined as a witness; he can not at the same time act in the capacity of both judge and witness. *The People v. Miller*, 179
3. Where a juror, on being called, is challenged on the ground of his having formed or expressed an opinion as to the guilt of the prisoner, such juror may be examined as a witness for the purpose of sustaining a challenge. *The People v. Christie*, 579
4. A juror, when examined as a witness for the purpose of sustaining a challenge to the favor, will not be excused from answering, whether he has any prejudice or bias against a religious sect, on the ground that such answer would disgrace him. *ib*
5. Where on the trial of several defendants on an indictment for a riot, it appeared that a secret society had been organized for the purpose of repressing the class or sect to which the defendants belonged, it was held to be competent to require a witness who had been called and had testified on the part of the prosecution, to answer on a cross-examination, whether he was a member of such secret society *ib*

See INSANITY.
COURT OF SESSIONS.

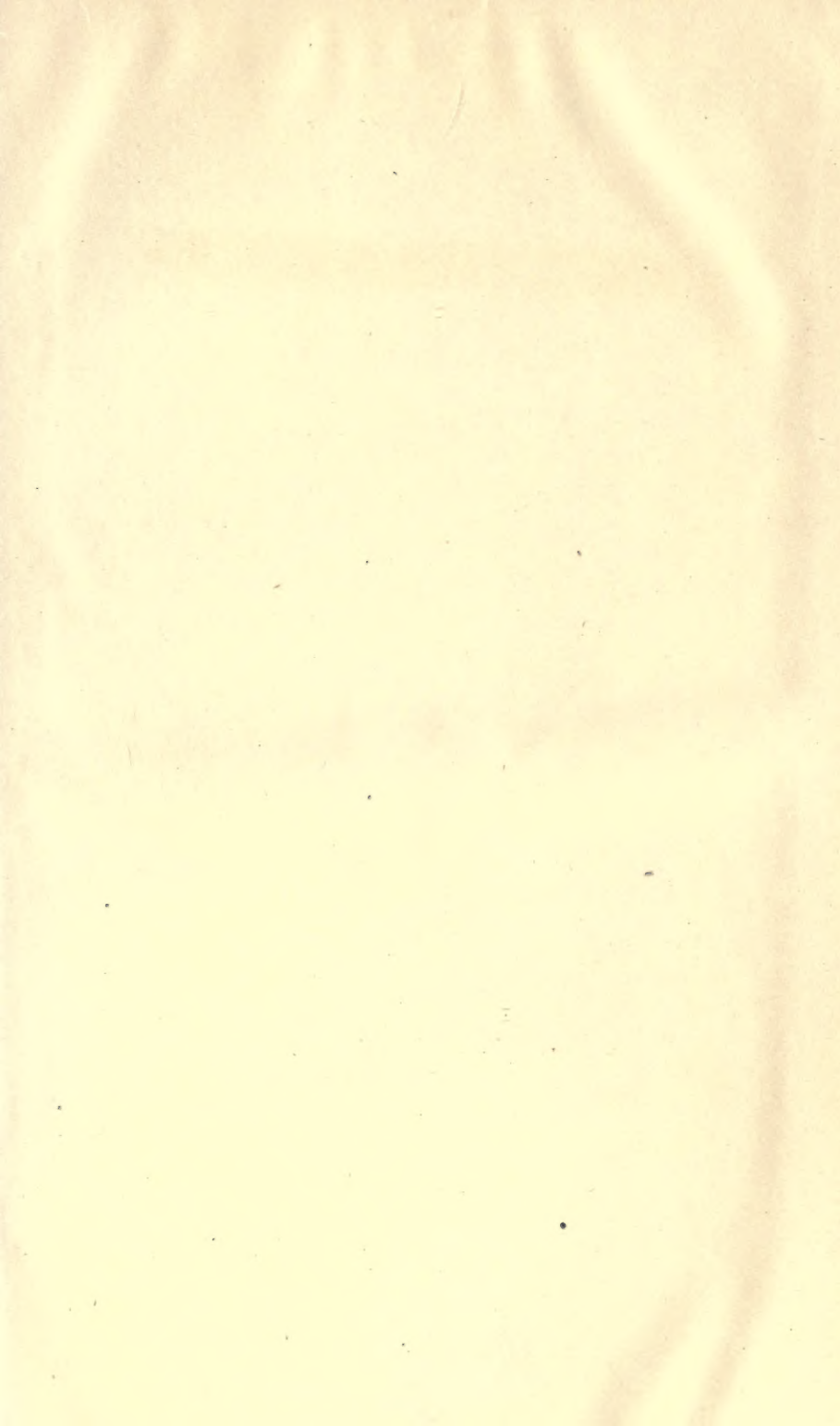
WRIT OF ERROR.

See CERTIORARI.
HABEAS CORPUS.

END OF VOLUME SECOND.







University of California
SOUTHERN REGIONAL LIBRARY FACILITY
305 De Neve Drive - Parking Lot 17 • Box 951388
LOS ANGELES, CALIFORNIA 90095-1388

Return this material to the library from which it was borrowed.

MAY 02 2005

JAN 19 2005

UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 166 764 9

FACULTY LIBRARY

LAW LIBRARY

UNIVERSITY
OF CALIFORNIA
LOS ANGELES



